IN THE SUPREME COURT OF FLORIDA

Case No. SC10-807
Lower Court Case No. 2000-CF-573-K

MICHAEL ANTHONY TANZI,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT, IN AND FOR MONROE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Tanzi's motion for post-conviction relief following an evidentiary hearing. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

"R." -- record on direct appeal to this Court;

"T." -- trial transcripts on direct appeal to this Court;

"PCR." – postconviction record on appeal to this Court;

"Supp. PCR." -- supplemental postconviction record on appeal to this Court. Additional citations will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Tanzi has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Tanzi, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

The Circuit Court for the Sixteenth Judicial Circuit, in and for Monroe County, Florida, entered the final judgments of conviction and death sentence currently at issue. On April 27, 2000, Mr. Tanzi was apprehended in Key West, Florida, for questioning into the disappearance of Janet Acosta. Mr. Tanzi was subsequently indicted for the first-degree murder of Janet Acosta on May 16, 2000. (R. 13-14). An amended information was filed on March 26, 2002, charging Mr. Tanzi with carjacking with a weapon, kidnapping to facilitate a felony with a weapon, armed robbery with a deadly weapon, and two counts of sexual battery with a deadly weapon. (R. 299-301).

The circuit court appointed the Office of the Public Defender to represent Mr. Tanzi. The Public Defender's Office assigned Attorney Stephanie Fleming to Mr. Tanzi's case. Subsequently, Ms. Fleming was removed from the case and attorneys Nancy Rossell and William Kuypers were assigned.

Initially, Mr. Tanzi pled not guilty to all charges. (R. 22). On January 31, 2003, Mr. Tanzi entered a guilty plea to the counts of first-degree murder, carjacking, kidnapping, and armed robbery. Mr. Tanzi elected to be tried in Miami-Dade County for the two counts of sexual battery.[1] Mr. Tanzi also sought to waive

[1] After the two sexual battery charges were severed, the State elected to not prosecute those charges. (R. 1803).

his right to a jury recommendation of sentence. (R. 1242-44; 2269; 2276; 2423-25). The trial court denied Mr. Tanzi's request for a waiver of a penalty phase jury. (R. 1925-26).

Later that same day, Mr. Tanzi attempted, without the assistance of counsel, to withdraw his guilty plea. (R. 2044). In court, Mr. Tanzi expressed his surprise and confusion at having given up his right to a jury trial in the guilt phase, with the attendant loss of any issues on appeal, if he wasn't going to receive the anticipated benefit of a bench trial at the penalty phase. (R. 2046-47). Mr. Tanzi also raised concerns about his attorneys' representation of him going into the plea agreement. (R. 2048). The trial court inquired into his relationship with his trial attorneys, but did not rule on Mr. Tanzi's motion to withdraw his plea. Id.

The circuit court conducted Mr. Tanzi's penalty phase on February 10 - 19, 2003. At the penalty phase, counsel presented Linda Sanford, a forensic social worker who had evaluated Mr. Tanzi for the Chamberlain School and supervised his treatment there. (T. 1080; 1100). Ms. Sanford reviewed Mr. Tanzi's extensive history, and his continuous commitment in various mental institutions from 1991 through 1995. (T. 1082-1101). She also testified to the failure of Mr. Tanzi's sexual offender treatment. It was not until 1993 that Mr. Tanzi was finally placed in an appropriate program at Brightside. After ten months he was

discharged, against medical advice, due to budget constraints and his mother's overestimation of his progress. (T. 1093).

The defense also presented William Vicary, M.D., a California forensic psychiatrist. Dr. Vicary found several diagnoses, "the most important" being Bipolar Disorder. People with Bipolar Disorder tend to go on sprees or engage in destructive behavior "without regard to the repercussions or consequences." (T. 1160). Michael's history of impulsive behaviors – unable to stay quiet, irritable, volatile and angry, friendless, fighting with peers and teachers, suspended, setting fires – was consistent with a classic case of misdiagnosed child onset Bipolar Disorder. (T. 1161). Dr. Vicary categorized Mr. Tanzi's Bipolar Disorder as "severe," on a scale of 1-to-10, an eight or nine. (T. 1168). Dr. Vicary also found substance abuse, paraphilia and antisocial personality disorder. (T. 1159). Mr. Tanzi was suffering from all of these psychiatric disorders at the time of the offenses, which would not have occurred otherwise. (T. 1167-68). These illnesses substantially affected Mr. Tanzi's ability to appreciate the criminality of his conduct, and to conform his conduct to the requirements of the law. (T. 1168).

Counsel failed to provide Dr. Vicary with the videotapes of Mr. Tanzi's statements to police after he was apprehended. On cross-examination, Dr. Vicary admitted that the videotape was an "important component of the equation" and that "it would have been better if I had seen the videotape." (T. 1184-85).

Dr. Vicary had a disciplinary history as a result of his conduct in the highly sensationalized murder case involving Eric and Lyle Menendez's violent murder of their parents in Los Angeles, California. As the treating psychiatrist for Eric Menendez, Dr. Vicary made notes about things that Eric Menendez said. When Dr. Vicary met with Leslie Abramson, Mr. Menendez's attorney, she told him to remove certain things from the notes that were potentially harmful to Menendez that could be used by the prosecution in his criminal case. Abramson instructed that Dr. Vicary remove those statements from his notes and conceal it from the prosecution or he would be removed from the case. (T. 1148-51). Dr. Vicary chose to "commit the ethical violation and continue being involved in the case." (T. 1205-9). He also rewrote his notes so that it wouldn't be apparent that he had removed things from them, and the "doctored up" notes were then sent to the prosecution. (T. 1205). The executive director of the California Medical Board initiated the complaint himself based on medial accounts of the case. (T. 1205-09). As a result of his conduct, Dr. Vicary's license was revoked by the State of California. That revocation was suspended, however, Dr. Vicary was required to pay the costs of the investigation, and was placed on professional probation and required to take an ethics course. (T. 1151).

Before Dr. Vicary took the stand at the penalty phase, the defense moved in limine to exclude evidence of the California Medical Board matter and the

resulting license suspension and probation. (R. 1290-91; 1293-1302; T. 1121-36). The court permitted the State to present the California disciplinary record over defense objection. (T. 1204-08).

Alan Raphael, Ph.D., a Florida forensic psychologist also testified at the penalty phase. Dr. Raphael diagnosed Mr. Tanzi with eleven disorders spanning all five diagnostic categories. (T. 1299). Dr. Raphael testified that Mr. Tanzi suffers from Axis 1 disorders including Polysubstance Dependence, Posttraumatic Stress Disorder, Exhibitionism, sexual sadism, voyeurism, R/O Schizophrenia, schizoaffective disorder, and psychotic disorder. These are all psychotic disorders, meaning you have hallucinations, you're hearing voices, seeing things. Your ability to perceive the world you live in accurately is falsely distorted. (T. 1302). Mr. Tanzi was put on Haldol while he was in jail because he was psychotic. (T. 1302). In addition, Dr. Raphael testified that Mr. Tanzi suffers from Attention-Deficit Hyperactivity Disorder, learning disability and bereavement. (T. 1302-3). Dr. Raphael also diagnosed Antisocial Personality Disorder (Axis 2), physical problems (Axis 3), and problems with family, imprisonment and homelessness (Axis 4). Mr. Tanzi's Global Assessment of Functioning was 40-45, which is well below the normal range. (T. 1305). Dr. Raphael opined that Mr. Tanzi was suffering from these disorders at the time of the offense, and that they affected his ability to appreciate the criminality of his conduct. (T. 1312).

In addition to expert testimony, the defense presented Phyllis Whalen, Mr. Tanzi's mother at the penalty phase. Ms. Whalen identified childhood photographs of Mr. Tanzi and testified to his childhood difficulties, mental problems, and his father's death.

The jury recommended Mr. Tanzi be sentenced to death by a vote of 12 - 0. (R. 1820-24).

On March 14, 2003, the Court conducted a *Spencer*[2] hearing. (R. 2214-34). At that hearing, trial counsel read a letter to the court from Mr. Tanzi's mother pleading for his life and submitted statements of Ms. Acosta's family and long-time boyfriend to show that Ms. Acosta opposed the death penalty. (R. 1220-1222). Trial counsel Rossell admitted that this was her "first time doing one of these hearings" and that she was not sure how to conduct it. (R. 2225). Mr. Tanzi read his own prepared statement to the Court. (R. 2228-2232).

On April 11, 2003, the circuit court entered its sentencing order sentencing Mr. Tanzi to death for the murder of Janet Acosta, and consecutive life sentences for each count of carjacking, kidnapping and robbery. [3,4] (R. 1804-1832).

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[2] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

[3] The trial court found the following seven (7) aggravating factors: (1) the murder was committed by a person previously convicted of a felony and under sentence of imprisonment or on felony probation (great weight); (2) the murder was committed during the commission of a kidnapping (great weight); (3) the murder was committed during the commission of two sexual batteries (great

On April 25, 2003, the trial court appointed the Office of the Public Defender for the Eleventh Judicial Circuit to represent Mr. Tanzi in his direct appeal to the Florida Supreme Court. On May 8, 2003, appellate counsel filed a Motion to Withdraw Pleas of Guilty and for Evidentiary Hearing on Motion. (R. 2134-58). The trial court conducted an evidentiary hearing on November 15, 2004. (R. 2490; 2312-2497). On January 6, 2005, the trial court issued its order denying Mr. Tanzi's motion to withdraw his plea. (R. 2302).

This Court affirmed Mr. Tanzi's conviction and sentence on direct appeal. *Tanzi v. State*, 964 So. 2d 106 (Fla. 2007).[5] Mr. Tanzi's motion for rehearing was

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weight); (4) the crime was committed for the purpose of avoiding arrest (great weight); (5) the murder was committed for pecuniary gain (great weight); (6) the murder was especially heinous, atrocious, or cruel ("utmost" weight); and (7) the murder was committed in a cold, calculated, and premeditated manner (great weight). (R. at 1804-1832).

[4] The trial court found the following mitigating factors: (1) Mr. Tanzi suffered from Axis II personality disorders (some weight); (2) Mr. Tanzi was institutionalized as a youth (some weight); (3) Mr. Tanzi's behavior benefited from psychotropic medications (some weight); (4) Mr. Tanzi lost his father at a young age (some weight); (5) Mr. Tanzi was sexually abused as a child (some weight); (6) Mr. Tanzi twice attempted to join the military (some weight); (7) Mr. Tanzi cooperated with law enforcement (some weight); (8) Mr. Tanzi assists other inmates by writing letters and he enjoys reading (some weight); (9) Mr. Tanzi's family has a loving relationship with him (some weight); and (10) Mr. Tanzi has a history of substance abuse (found, but given no weight). (R. at 1804-1832).

[5] Mr. Tanzi raised the following issues on direct appeal: (1) the trial court erred in denying his motion to withdraw his guilty plea; (2) the trial court erred in permitting questions regarding lack of remorse; (3) the trial court erred in permitting impeachment of his expert witness by a specific and unrelated act of

denied on August 27, 2007, and the Mandate issued on September 12, 2007. On November 26, 2007, Mr. Tanzi filed a Petition for Writ of Certiorari in the United State's Supreme Court, which was denied on February 19, 2008. *Tanzi v. Florida*, 128 S. Ct. 1243 (2008).

Mr. Tanzi initiated his state postconviction proceedings by requesting public records pursuant to Fla. R. Crim. P. 3.852. (Supp. PCR. 49-79). Mr. Tanzi filed his Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend pursuant to Fla. R. Crim. P. 3.851 on February 13, 2009. (PCR. 1-175). The State filed a response on March 30, 2009. (PCR. 176-237). The Circuit Court conducted a case management conference on June 12, 2009, and issued an order on June 30, 2009, granting an evidentiary hearing on several of Mr. Tanzi's claims. (PCR. 308-313). On July 28, 2009, Mr. Tanzi filed a Motion for Leave to Amend with two additional claims. (PCR. 324-358). The State responded on July 30, 2009. (PCR. 359-65). The circuit court issued its Order denying Mr. Tanzi's motion for leave to amend on August 14, 2009. (PCR. 392-93).

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misconduct; (4) the trial court erred in admitting his confession to sexual battery; (5) the trial court erred in assessing the murder in the course of a felony aggravator twice; and (6) the trial court did not properly consider and weigh mitigation evidence. Mr. Tanzi also claimed that Florida's death sentencing statute violates *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). *Tanzi v. State*, 964 So. 2d 106 (Fla. 2007).

The circuit court conducted an evidentiary hearing on January 25-28, 2010. (PCR.-T 1-433). At the evidentiary hearing, Mr. Tanzi presented several lay and expert witnesses. Mr. Tanzi was represented at trial by Attorneys Nancy Rossell and William Kuypers of the Monroe County Public Defender's Office. William Kuypers testified at Mr. Tanzi's evidentiary hearing that Ms. Rossell was the lead attorney and primarily responsible for the guilt phase.[6] Mr. Kuypers was primarily responsible for the sentencing phase. (PCR-T. 95). Mr. Kuypers took over those responsibilities from Attorney Stephanie Fleming, who had taken one of Mr. Kuypers's cases in exchange for him assuming her responsibilities in Mr. Tanzi's case. At the time of Mr. Tanzi's trial, Mr. Kuypers had tried "maybe three, four maybe" capital guilt phases. (PCR-T. 96). In addition, Mr. Kuypers assisted directly or indirectly on approximately eight homicide cases. (PCR-T. 130).

According to Mr. Kuypers, the investigation was conducted by "our office, the attorney and the investigators in our office." (PCR-T. 97). There were two investigators at the public defenders office at the time, and Attorney Stephanie Fleming conducted some of the investigation herself. Mr. Kuypers had no recollection of what the investigators did or their training, but recalls that "they are both ex police officers with a lot of experience in criminal investigation." (PCR-

[6] Tragically, Nancy Roselle committed suicide November 5, 2003.

T. 98). Prior to Mr. Kuypers's involvement, Ms. Fleming traveled to Massachusetts and New York to conduct investigation. (PCR-T. 136-7). Mr. Kuypers subsequently went to Massachusetts for depositions and to speak with Mr. Tanzi's mother and "whoever else I could speak to." (PCR-T. 137).

Mr. Kuypers testified that he was aware of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, however he was not aware that the guidelines pertained to Mr. Tanzi's case: "I don't think the ABA guidelines were in effect at that time, but I may be wrong." (PCR-T. 133).

Mr. Kuypers testified at the hearing that psychiatrist William Vicary, M.D., had been retained by the public defender's office prior to his involvement with Mr. Tanzi's case. (PCR-T. 99). Mr. Kuypers provided background materials and records to Dr. Vicary, but failed to provide him with a copy of Mr. Tanzi's videotaped statement to the police. (PCR-T. 119). Mr. Kuypers had no knowledge of Dr. Vicary's background and had never worked with him before. (PCR-T. 100). To his knowledge, no efforts were made to investigate Dr. Vicary's background. "We had his resume and that was it". (PCR-T. 100). Mr. Kuypers did not learn about Dr. Vicary's disciplinary problems in the Menendez case until the State deposed Dr. Vicary in preparation for the penalty phase. (PCR-T. 101).

Mr. Kuypers testified that he had spoken with Hampton Perkins, a neighbor of the Tanzi's, in Brockton, Massachusetts. Mr. Perkins was one of the few people

in the neighborhood who showed care for Mr. Tanzi. Trial counsel felt that his testimony could have been helpful by humanizing Mr. Tanzi. (PCR-T. 120). Mr. Kuypers felt so strongly about the potential benefits of Mr. Perkins testimony that he would have called him as a witness even if his testimony was inconsistent with other evidence presented at the penalty phase. (PCR-T. 154-5). However, Mr. Kuypers never presented Mr. Perkins to the jury because he believed Mr. Perkins "didn't want to come." And "felt it was too much of an effort" given his age and apparent infirmity." (PCR-T. 120-1). Despite his belief that Mr. Perkins was a valuable witness, Mr. Kuypers made no effort to secure Mr. Perkins because he did not think Mr. Perkins would be cooperative if he did. (PCR-T. 122).

Mr. Tanzi's penalty phase was to begin on February 10, 2003. On February 7, 2003, the Assistant State Attorney Manuel Madruga sent a memorandum to trial counsel:

> In a telephone conversation with Robin Ragsdale, of the Florida Department of Law Enforcement, on 2-07-03, she indicated to me that while conducting DNA analysis on the above referenced case she noticed an increased presence of Y chromosomes in the defendant's cells. She did not confirm that the defendant was an XYY genotype, but suspected it was a possibility. In an abundance of caution I offer this information to you for whatever value it may have. A copy of this letter will be filed with the court.

(Defense Exhibit 4). (PCR-T. 126). Mr. Kuypers did not recall seeing the memorandum; the first time he learned about the possibility that Mr. Tanzi suffers from 47,XYY Syndrome was during a telephone conversation with postconviction

counsel. (PCR-T. 111). Had he seen the State's memorandum, Mr. Kuypers would have investigated further. He would have at least provided the information to his experts and followed up on it to see if it was relevant to mitigation. (PCR-T. 115-6).

Mr. Tanzi also presented Dr. Karl Muench, a medical geneticist. Dr. Muench testified that he was asked to consult on Mr. Tanzi's case. (PCR-T. 16). To that end, Dr. Muench reviewed some background materials and a cytogenetics testing report prepared by the University of Florida Cytogenetics Laboratory. (PCR-T. 17; Defense Exhibit 20). The cytogenetics testing report indicates that Mr. Tanzi suffers from 47,XYY Syndrome. (PCR-T. 20) (Defense Exhibit 2). 47,XYY Syndrome is the result of a male child being born with an additional Y chromosome. (PCR-T. 21).

While there is no apparent causal link between 47,XYY and criminal behavior, there is a well documented statistical link between 47,XYY and behavioral issues related to development. (PCR-T. 32). There are numerous studies on behavioral aspects in populations of XYY males, notably in school situations, in which these children experience impaired socialization, increased problems with inner social skills, learning disabilities, impulsive behaviors, and identifiable traits which would lead to placement in special school situations or which would lead to recommendation for a psychological evaluation or a psychiatric evaluation. (PCR-

T. 33-34). Moreover, individuals with 47,XYY disorder have statistically been found to possess lower intelligence than the general population or their siblings and an approximately 15% decrease on IQ tests. (PCR-T. 31). In a follow up study of thirty-eight XYY boys, approximately 50% had documented psychological problems, indicating "considerably increased risks" for delayed language and motor development and psychiatric disorders such as autism. (PCR-T. 60-61).

Hampton Perkins testified that Mr. Tanzi grew up across the street from the Perkins family. (PCR-T. 284). Mr. Perkins stressed to the young Mr. Tanzi the importance of doing well in school and getting good grades. On occasion, Mr. Perkins would take Mr. Tanzi out for breakfast if he did well in school and got a good report card. (PCR-T. 287). Mr. Perkins was contacted by trial counsel, but did not testify at Mr. Tanzi's penalty phase. (PCR-T. 289).

Julia Perkins, Hampton's daughter, also testified at the evidentiary hearing to her experiences with Mr. Tanzi when he was a small child. (PCR-T. 295). Ms. Perkins recalled that Mr. Tanzi's father was "stern." In one incident she witnessed, Tony grabbed him by the back and kicked him. (PCR-T. 301).

After Tony's death, Ms. Perkins babysat Mr. Tanzi. "Mikey" cried a lot. (PCR-T. 295). He was often picked on by other neighborhood kids, who called him names. (PCR-T. 295) and he would cry when they teased him. (PCR-T. 298). The young Mr. Tanzi would sometimes instigate problems with the other kids, but he

was an "easy target." (PCR-T. 300). Moreover, Mr. Tanzi would rarely defend himself or fight back. (PCR-T. 298-9).

Ms. Perkins babysat for Mr. Tanzi until there came a time when he became defiant and would not listen to her anymore. (PCR-T. 303-4). Thereafter, Sean Martin babysat him. (PCR-T. 304). Sean Martin was also picked on by the neighborhood kids. (PCR-T. 300). Trial counsel made no effort to call Ms. Perkins to testify at the penalty phase.

Sean Martin also testified at the evidentiary hearing that Mr. Tanzi's father was abusive. He witnessed one incident when Mr. Tanzi was in elementary school, in which Tony slammed Mr. Tanzi's head against the side of his truck. (PCR-T. 256). Mr. Tanzi did not perform well in school and got into a lot of trouble. (PCR-T. 258), he did not have many friends in the neighborhood and got into a lot of fights. (PCR-T. 258-9). Usually, the fights started with name calling. (PCR-T. 258) Mr. Tanzi was rude to other people in the neighborhood, and often brought the fights upon himself. Nobody would defend Mr. Tanzi except Mr. Martin. (PCR-T. 259). Mr. Martin recalled that Mr. Tanzi's mother was not home much and frequently left Mr. Tanzi alone, unattended, while she was at work or out with boyfriends. (PCR-T. 261, 262).

Mr. Martin had a sexual relationship with Mr. Tanzi when he was a child. Mr. Martin is five years and nine months older than Mr. Tanzi, and that these

encounters occurred when Mr. Tanzi was in elementary school. Mr. Martin and Mr. Tanzi witnessed Mr. Tanzi's mother engaging in sex with her boyfriend multiple times while Mr. Tanzi was still in elementary school. (PCR-T. 264). Mr. Tanzi also had access to pornographic magazines and "stuff that were his father's." (PCR-T. 271).

At the evidentiary hearing, Phyllis Whalen, Mr. Tanzi's mother, testified to the extent of the troubles in the Tanzi home. Mr. Tanzi's father had made it clear that he did not want to have a child. (PCR-T. 343). He was physically and verbally abusive to Ms. Whalen and Mr. Tanzi. (PCR-T. 342), to the extent that Ms. Whalen's mother found it necessary to interject. (PCR-T. 361)

The abuse got even worse after Tony was diagnosed with pancreatic cancer. Mr. Tanzi became more disruptive and angry, and started getting into trouble". (PCR-T. 344) His father reacted by being "very verbally abusive," angry and mean. (PCR-T. 344). Tony would degrade Michael and scream at him. (PCR-T. 354). The spanking was "excessive." (PCR-T. 361)

From early childhood, Mr. Tanzi acted out and was temperamental. (PCR-T. 342). When Mr. Tanzi wasn't doing well in school, teachers thought he had ADHD. He had a very short attention span and was disruptive in class. (PCR-T. 346). Mr. Tanzi had almost no friends. (PCR-T. 346). Kids in the neighborhood called him "gay boy" because of his association with Sean Martin. (PCR-T. 370).

When Mr. Tanzi was 11 or 12, Ms. Whalen learned from psychiatrists at Pembroke Hospital that Mr. Tanzi had been sexually abused. (PCR-T. 349). He responded well in Mentor Program, where there were male figures who cared for him. (PCR-T. 349). Mentor tried to medicate him with Ritalin for his "acting out" and ADHD, but they said he needed residential treatment. (PCR-T. 350). After a few weeks at Mentor, Mr. Tanzi was transferred to a residential facility in Brockton. (PCR-T. 350). They agreed Mr. Tanzi had been sexually abused. He acted out there as well. They were understaffed, so Ms. Whalen volunteered to take Mr. Tanzi to a meeting for sexual abuse victims. Mr. Tanzi didn't want to go in to the meeting, even after a counselor tried to coax him to go in. He slammed the car door and ran off. (PCR-T. 351-2)

While at the Pilgrim Center, Mr. Tanzi had additional difficulties. (PCR-T. 353-4). They sent him to a "permanent residence" called Brightside. (PCR-T. 354), where he stayed for about a year. Ms. Whalen signed Mr. Tanzi out of Brightside because family members thought there was nothing wrong with Michael, though the people at Brightside did not think it was advisable. (PCR-T. 354-5) Brightside did not want Mr. Tanzi to leave the program. (PCR-T. 369)

Mr. Tanzi subsequently came to live with Ms. Whalen and her husband in Taunton. He was edgy and made them nervous. (PCR-T. 355). After his arrest for making obscene phone calls, Mr. Tanzi was sent to a program in Middleborough.

He did well there, graduating first in his small class. After completing that program Mr. Tanzi went to live at home again. (PCR-T. 356)

After a few weeks, trouble started again. (PCR-T. 357) Mr. Tanzi was arrested for carjacking and served six months. (PCR-T. 358). At the time, Mr. Tanzi was smoking marijuana and using other drugs. He was living on the streets for a while, then moved in with a woman in "the projects." One night, Ms. Whalen got a call from her father-in-law and went to Whitman where she found Mr. Tanzi. He overdosed on his roommate's blood pressure pills trying to get high. (PCR-T. 358-9). Ms. Whalen didn't hear from Mr. Tanzi again for another six months, until he called on Christmas to say "I love you, and I want to say Merry Christmas and he told me where he was living." (PCR-T. 360)

Alan J. Raphael, Ph.D., testified at Mr. Tanzi's evidentiary hearing that he had never met Dr. Vicary. (PCR-T. 198) and had never seen his deposition prior to testifying at Mr. Tanzi's penalty phase. (PCR-T. 200). His organization, International Assessment Systems (IAS), did make a rule-out diagnosis of "schizoaffective disorder of a bipolar type". (PCR-T. 201), a psychotic disorder. However, there are five different types of Bipolar Disorder, a mood disorder, in the DSM-IV and IAS did not diagnose any of them. (PCR-T. 202). According to Dr. Raphael's review of Mr. Tanzi's extensive mental health history, no other expert had ever found Mr. Tanzi to suffer from Bipolar Disorder.

Richard Dudley, M.D., a psychiatrist, testified that he evaluated Mr. Tanzi over a period of two full days. (PCR-T. 378). Dr. Dudley requested cytogenetic testing because of the indication of a chromosomal abnormality in both the records he reviewed, and Mr. Tanzi's history. As a medical doctor with some training in genetics, Dr. Dudley recommended that an expert geneticist be consulted.

Dr. Dudley found that Mr. Tanzi had an extremely difficult and traumatic childhood and early adolescence "of the type that would lend to the development of significant psychiatric difficulties". (PCR-T. 381). He identified Mr. Tanzi's XYY chromosomal abnormality as another risk factor for the development of similar difficulties (Id). As a result. Mr. Tanzi has developed fairly profound major psychiatric difficulties that have impaired his ability to function quite significantly over time. (PCR-T. 381).

Dr. Dudley diagnosed Post Traumatic Stress Disorder (PTSD), Depressive Disorder NOS, Borderline Personality Disorder, Alcoholism, Polysubstance Abuse, Sexual Disorder NOS. (PCR-T. 382). He explained that PTSD is an anxiety disorder with the triggering events of the death of Mr. Tanzi's father and his perceptions of what was occurring at that time, and the abuse he was enduring at the same time. (PCR-T. 384). Mr. Tanzi did not have a sense at the age of 8 that his father was actually dying, and so that when the death occurred, it was unanticipated. Even following the death, there was no discussion of it or

explanation of it among the family. As a result, Mr. Tanzi's perception was that his father had been killed and taken from him. (PCR-T. 385). Dudley explained that during this "obviously stressful time" physical punishments had been "at a minimum obsessive," and, at the same time, Mr. Tanzi began to be sexually abused as well. (PCR-T. 385).

Dr. Dudley also explained that Mr. Tanzi suffers from Borderline Personality Disorder, "the most severe of the personality disorders". (PCR-T. 388). People with this disorder have extremely unstable attachment issues, frantically trying to connect with someone and not believing their connections will remain stable. (PCR-T. 389). They exhibit instability in their own understanding of who they are, instability in their mood, and chronic depressive sorts of moods. (PCR-T. 389). Under stress they deteriorate into dissociative or brief psychotic states. "Its a very fragile personality structure." (PCR-T. 389). Based on his evaluation, Dr. Dudley opined that of Mr. Tanzi was under the influence of an extreme mental or emotional disorder, and that his capacity to conform his conduct to the requirements of the law was substantially impaired at the time of the offense.

The parties submitted posthearing memoranda. (PCR. 438-482; 483-510). Thereafter, the circuit court entered an Order Denying Motion to Vacate Judgments of Conviction and Sentence on March 22, 2010. (PCR. 511-520). Mr.

Tanzi timely filed a Notice of Appeal on April 19, 2010. (PCR. 521). This appeal follows.

SUMMARY OF THE ARGUMENT

ARGUMENT I: Mr. Tanzi is being denied a meaningful and appropriate appellate review because the lower court failed to make meaningful findings of fact and conclusions of law. The circuit court's order fails to reference to the trial or postconviction record or specific case law, fails to set forth any determination of the credibility of any witnesses, and fails to explain the court's legal reasoning.

ARGUMENT II: Mr. Tanzi was denied the effective assistance of counsel at penalty phase. Trial counsel failed to adequately investigate and prepare a mitigation case. Counsel's selection and preparation of mental health experts was deficient. Counsel failed to present available witnesses, failed to present evidence that Mr. Tanzi suffers from a genetic disorder. Mr. Tanzi was prejudiced as a result.

ARGUMENT III: The circuit court erred in summarily denying Mr. Tanzi's claims of Juror Misconduct, violations of *Brady v. Maryland*, ineffective assistance of counsel at the *Spencer* hearing, conflicts of interest and challenge to Florida's lethal injection statute.

ARGUMENT IV: The circuit court erred in denying Mr. Tanzi leave to amend his postconviction motion with additional claims of newly discovered

evidence and violations of the Confrontation Clause. Mr. Tanzi established timeliness and good cause to permit him to amend with these additional claims.

ARGUMENT V: The circuit court abused its discretion in denying Mr. Tanzi access to additional public records to which he is entitled.

STANDARD OF REVIEW

Ineffective assistance of counsel claims present mixed questions of law and fact subject to plenary review. *Occhicone v. State*, 768 So. 2d 1037, 1045 (Fla. 2000). This Court independently reviews the trial court's legal conclusions and defers to the trial court's findings of fact.

A postconviction court's decision whether to grant an evidentiary hearing is subject to *de novo* review. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

This Court applies the "abuse of discretion" standard when reviewing appeals from denials of requests for public records. *Hill v. State*, 921 So. 2d 579 (Fla. 2006).

ARGUMENT I

MR. TANZI IS BEING DENIED A MEANINGFUL AND APPROPRIATE APPELLATE REVIEW BECAUSE THE LOWER COURT FAILED TO MAKE MEANINGFUL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Florida Rule of Criminal Procedure 3.851(f)(5)(D) requires a circuit court to "render its order, ruling on each claim considered at the evidentiary hearing and all other claims raised in the motion, making detailed findings of fact and conclusions of law with respect to each claim, and attaching or referencing such portions of the record as are necessary to allow for meaningful appellate review." This Court explained:

> A complete circuit court order enables this Court to review any factual and credibility questions with the appropriate standard of review. The evidentiary record here presents factual conflicts which must be resolved by the circuit court in findings of fact. Likewise, the circuit court's determination as to the credibility of expert testimony presented at the evidentiary hearing needs to be set forth in an order.

Mendoza v. State, 964 So. 2d 121 (Fla. 2007).

On March 22, 2010, the lower court issued its Order on Motion to Vacate Judgment of Conviction and Sentence at issue. (PCR. 511-520). The lower court's order addressed only the ineffective assistance of counsel claim for which Mr. Tanzi had been granted an evidentiary hearing.

In its order, the circuit court tersely quotes this Court's decisions in *Maxwell v. Wainwright*, 490 So. 2d 927 (Fla. 1986) and *Darling v. State*, 966 So. 2d 366

(Fla. 2007) for the standard in addressing ineffective assistance of counsel claims. The lower court then merely lists 49 one- or two-sentence "findings of fact" in a conclusory manner, with out citations to the trial record or the record of the evidentiary hearing. There is no discussion of the testimony or evidence presented other than a two-sentence reference to the evidentiary hearing testimony of Sean Martin. (PCR. 515). Most of the court's "findings of fact" appear to be based on the trial record, or perhaps the postconviction testimony of trial attorney Bill Kuypers. However, it is impossible to tell from the court's order whose testimony, what evidence, or even which proceeding, on which the court based its findings.

The order does not set forth any determination of the credibility of any witnesses, expert or otherwise. Mr. Tanzi presented three expert witnesses at the postconviction hearing, including psychologist Alan Raphael, Ph.D., psychiatrist Richard Dudley, M.D., and medical geneticist Karl Muench, M.D. Not one of these experts is mentioned in the court's order, nor is any of their testimony referenced, either to address their credibility or to discuss their testimony. Indeed, the only expert the court refers to by name is Dr. William Vicary, the psychiatrist presented at Mr. Tanzi's penalty phase, who did not testify at the evidentiary hearing.

The court then merely lists 9 one- or two-sentence "conclusions of law," again without reference to the trial or postconviction record, without reference to specific case law, and without any explanation of its legal reasoning.

"Without the circuit court's determination in the instant case of the facts demonstrated at the evidentiary hearing or the credibility of the witnesses, [this Court is] unable to have a meaningful and appropriate appellate review." *Mendoza v. State*, 964 So. 2d 121 (Fla. 2007). This Court cannot conduct a meaningful and appropriate review of Mr. Tanzi's postconviction claims because the lower court has failed to make meaningful findings of fact and law.

Failure to engage with the facts, make factual findings, consider defense expert testimony and meaningfully and probingly consider evidence related to claims of ineffective assistance of counsel is contrary to the United States Supreme Court's clearly established Sixth Amendment precedents. *Porter v. McCollum*, 130 S. Ct. 447, 454-55 (2009); *see also Sears v. Upton*, 130 S. Ct. 3259 (2010). This Court should remand the case to the circuit court for entry of an order which would enable this Court to conduct meaningful and appropriate appellate review.

ARGUMENT II

MR. TANZI WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT PENALTY PHASE

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id*. at 688 (citation omitted) . Beyond the guilt-innocence stage, defense counsel must also

discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (plurality opinion). In *Gregg* and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." *Id*. at 206. *See also Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976). Here, Mr. Tanzi's jury did not hear accurate sentencing information necessary to focus their attention on his individualized characteristics.

Mr. Tanzi "had a right – indeed a constitutionally protected right – to provide the jury with mitigating evidence that his trial counsel either failed to discover or failed to offer." *Williams v. Taylor*, 120 S. Ct. 1495, 1513 (2000). "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." *Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990) (*citing Lockett v. Ohio*, 438 U.S. 586 (1978)). In Mr. Tanzi's capital penalty phase proceedings, substantial mitigating evidence went

undiscovered and was thus not presented for the consideration of the sentencing jury or the judge.

Counsel's highest duty is the duty to investigate, prepare, and present the available mitigation. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003); *see also Williams v. Taylor*, 120 S. Ct. 1495 (2000); *Rompilla v. Beard*, 125 S. Ct. 2456 (2005) (reaffirming *Wiggins* and finding that "[e]ven when a capital defendant and his family members have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review materials that counsel knows the prosecution will probably rely on as evidence of aggravation at the trial's sentencing phase."). The conclusions in *Wiggins* are based on the principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." The *Wiggins* Court clarified that "in assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." 123 S. Ct. at 2538. In other words, counsel must conduct a complete investigation to know what evidence is available before a reasonable decision can be made whether or not to present it.

Throughout the Court's analysis in *Wiggins* of what constitutes effective assistance of counsel, it turned to the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines"). *See id*. at 2536-7. Under the ABA Guidelines, trial counsel in a capital case "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(c), p 93 (1989)." *Id*. at 2537.

Under the ABA Guidelines, there are specific requirements which should be met from the initial appointment on a case through its conclusion. Guideline 11.4.1(c) states, "the investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." In order to comply with this standard, counsel is obliged to begin investigating both phases of a capital case from the beginning. *See id*. at 11.8.3(A). This includes requesting all necessary experts as soon as possible. *See* Commentary on Guideline 11.4.1(c).

Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A defendant is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of showing a reasonable probability. See *Kyles v. Whitley*, 115 S. Ct. 1555 (1995) (discussing identity between *Strickland* prejudice standard and *Brady* materiality standard). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id*. As demonstrated herein, Mr. Tanzi was prejudiced by trial counsels' numerous failings.

In Mr. Tanzi's capital penalty phase proceedings, substantial mitigation evidence never reached the jury or the Court. The evidence that was presented was incomplete. Most significantly, trial counsel failed entirely in providing the jury with a complete and accurate picture of Mr. Tanzi's mental health. Instead, the mental health evidence presented was conflicting and provided no consistent, coherent theory of defense.

At the evidentiary hearing Mr. Tanzi's trial attorney, William Kuypers agreed that mental health diagnoses are theories of mitigation. Yet, in Mr. Tanzi's

case, he made no effort to ensure that a consistent theory be presented. None of the mental health experts who testified at Mr. Tanzi's penalty phase had met to discuss their findings with each other prior to testifying. As a result, no consistent theory was advanced because each witness testified that Mr. Tanzi suffered from different disorders. While the defense experts agreed that Mr. Tanzi met the requirements of both statutory mental health mitigators, and that there was substantial non-statutory mitigation, their diagnoses of Mr. Tanzi's mental health conditions were widely disparate. Rather than present the aspects of Mr. Tanzi's character that would mitigate his crime, the evidence presented served merely to confuse the jury and undermine the experts' credibility.

Trial counsel first presented William Vicary, M.D., a California psychiatrist, who testified that the "most important" diagnosis was Bipolar Disorder. (T. 1159). Dr. Vicary categorized Mr. Tanzi's Bipolar Disorder as "severe," on a scale of 1 – 10, an eight or nine. (T. 1168). Trial counsel then presented Alan Raphael, Ph.D., a Florida forensic psychologist. Dr. Raphael diagnosed Mr. Tanzi with eleven disorders spanning all five diagnostic categories. (T. 1299). However, unlike Dr. Vicary, Dr. Raphael did not find Bipolar Disorder.

Dr. Raphael testified again at Mr. Tanzi's evidentiary hearing that he had never met Dr. Vicary. (PCR-T. 198) and had never seen his deposition. (PCR-T. 200). His organization, International Assessment Systems (IAS), did make a

rule-out diagnosis of "schizoaffective disorder of a bipolar type". (PCR-T. 201), a psychotic disorder. However, there are five different types of Bipolar Disorder, a mood disorder, in the DSM-IV and IAS did not diagnose any of them. (PCR-T. 202). Indeed, according to Dr. Raphael's review of Mr. Tanzi's extensive mental health history, no other expert had ever found Mr. Tanzi to suffer from Bipolar Disorder.[7]

Trial counsel's failure to resolve this discrepancy among his experts is inexplicable. Mr. Tanzi's entire penalty phase case depended on the credibility of his expert witnesses and their diagnoses. Clearly, Mr. Tanzi suffers from several mental disorders, however, trial counsel chose to present the testimony of two mental health professionals whose findings were diametrically opposed to one another. As a result, the jury could only conclude that neither expert was reliable or credible, or was so confused by the experts' testimony that they rejected whatever value it may have had.

The presentation of such confusing and questionable testimony was further compounded by counsel's unreasonable decision to rely on Dr. Vicary, who had a

[7] Significantly, Mr. Tanzi's expert in postconviction, Dr. Richard Dudley, "did not find evidence of either periods of hypomania or episodes of full mania, at least one of which would be required to make the diagnosis of Bipolar Disorder." (PCR-T. 395) As with every other doctor involved throughout Mr. Tanzi's long mental health history, with the exception of the dubious Dr. Vicary, Dr. Dudley did not diagnose Bipolar Disorder.

previous disciplinary history in the highly-sensationalized Menendez murder case. (T. 1205 – 09). Counsel was aware of Dr. Vicary's disciplinary record but chose to rely on his testimony, which contradicted the testimony of Mr. Tanzi's other mental health expert, to convince the jury that Mr. Tanzi deserved a sentence less than death.

Mr. Kuypers testified at the hearing that Dr. Vicary was retained by the public defender's office prior to his involvement with Mr. Tanzi's case. (PCR-T. 99). Mr. Kuypers had no knowledge of Vicary's background and had never worked with him before. (PCR-T. 100). To his knowledge, no efforts were made to investigate Dr. Vicary's background. "We had his resume and that was it". (PCR-T. 100). Mr. Kuypers did not learn about Dr. Vicary's disciplinary problems until he was deposed by the State. (PCR-T. 101).

It is axiomatic that counsel has a duty to investigate the background of the witnesses he intends to present to determine whether those witnesses will be credible. Here, trial counsel, by his own admission, made no effort to investigate Dr. Vicary's background and disciplinary history. Rather, counsel learned of Dr. Vicary's disciplinary problems only after the State alerted him in deposition.

Moreover, once counsel was aware that Dr. Vicary had lied in another murder case, his decision to present Dr. Vicary constituted deficient performance. Mr. Kuypers did not articulate any strategic reason for presenting Dr. Vicary.

Indeed, any purported strategy would itself be unreasonable. Counsel could have presented Dr. Raphael's associates, including a credible psychiatrist and/or a neuro-psychologist, whose testimony would have supported Dr. Raphael's testimony rather than contradict it. Rather, trial counsel unreasonably determined that "Dr. Raphael spoke for them". (PCR-T. 119), and chose to present a contradictory and incredible witness instead.

The unreasonableness of trial counsel's decision to present Dr. Vicary despite his disciplinary history was further exacerbated by counsel's failure to provide the necessary background materials and information to Dr. Vicary, specifically the videotape of Mr. Tanzi's post-arrest statements to police.[8] As a result of counsel's failure to provide this "important component of the equation," the State effectively impeached Dr. Vicary. (T. 1184-85).

This omission cannot be attributed to any reasonable strategy. Counsel did provide the videotape to Dr. Raphael, who relied on it in his testimony. (T. 1338). Mr. Kuypers could not provide any reason, strategic or otherwise, for failing to provide the videotape to Dr. Vicary. (PCR-T. 119). Had counsel provided all available information, including the videotape of the confession, Dr. Vicary, whose credibility was already an issue before the jury due to his untruthful testimony in

[8] It is undisputed that Mr. Kuypers did not provide Dr. Vicary with the videotape. (PCR-T. 119).

another murder case, would not have been so effectively impeached. Not only would Dr. Vicary's opinion be supported by the videotaped statement, his credibility would not have been so demeaned.

Similarly, but most egregiously, trial counsel failed to inform their mental health experts that Mr. Tanzi potentially suffers from genetic defects that adversely affect his behavior, cognitive abilities and physical condition. Likewise, counsel failed to seek the assistance of qualified medical experts to investigate the impact that the genetic defects had on Mr. Tanzi. It is undisputed that on February 7, 2003, the state delivered a memorandum to trial counsel to the effect that there was a "possibility" that Mr. Tanzi "was an XYY genotype. (Defense Exhibit 4). At the evidentiary hearing, Mr. Kuypers denied that he knew this information when he prepared for Mr. Tanzi's penalty phase and that, had he seen the State's memorandum, he would have investigated further. Mr. Kuypers would have "at least" provided the information to his experts and "follow up on it to see if it was relevant to the mitigation." (PCR-T. 115-6).

Mr. Kuypers testified that the first time he learned about the possibility that Mr. Tanzi suffers from 47,XYY Syndrome was during a telephone conversation he had with Mr. Tanzi's collateral counsel. (PCR-T. 111). The only explanation which Kuypers could provide for not being aware of the State's memorandum was that lead counsel Nancy Rossell may have had it in her files which she kept separately.

(PCR-T. 114) Assuming, *arguendo*, that Ms. Rossell did not notify Mr. Kuypers of this potential mitigation, such a failure is patently deficient performance. Similarly, had Mr. Kuypers seen the memorandum that was addressed to him, his failure to notify his experts and to effectively investigate the XYY condition for the purposes of developing mitigation were inexcusable omissions constituting deficient performance.[9]

The lower court recognized that trial counsel "did not explore the possible consequences of possessing the XYY chromosomal pattern as the memorandum appears to have been merely filed." (PCR. 518). While it is unclear exactly what the lower court meant by "merely filed," the fact remains that the memorandum was addressed to Mr. Kuypers and Ms. Rossell. Despite being alerted to potential mitigation of this nature, trial counsel failed to notify their mental health experts that Mr. Tanzi may suffer from this disorder, failed to seek testing to confirm the diagnosis, and failed to conduct any investigation into whether Mr. Tanzi suffers from 47,XYY Syndrome. Clearly, once notified that this potential avenue of mitigation exists, trial counsel had a duty to investigate it. Failure to do so was deficient performance.

[9] To the extent that the memorandum was not presented to defense counsel but was "merely filed," Mr. Tanzi submits that the State has not fulfilled its obligations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). See ARGUMENT III (B.)

Counsel failed to call additional witnesses who were available but never called to testify despite having valuable mitigation information. Most significantly, Sean Martin was called to testify at the evidentiary hearing and admitted that he had a sexual relationship with Mr. Tanzi when Mr. Tanzi was a child. As he now describes it, they engaged in sexual behaviors "four or five" times. (PCR-T. 263). Despite the abusive nature of their sexual encounters, Mr. Martin insisted that it was "just kids fooling around kind of thing". (PCR-T. 263). Despite the fact that he is five years and nine months older than Mr. Tanzi, and that these encounters occurred when Mr. Tanzi was in elementary school, Mr. Martin insisted, "I never abused him." (PCR-T. 267). In addition to confirming that Mr. Tanzi had been sexually abused, Mr. Martin's testimony also demonstrated that he and Mr. Tanzi witnessed Mr. Tanzi's mother engaging in sex with her boyfriend multiple times while Mr. Tanzi was still in elementary school. (PCR-T. 264), and that Mr. Tanzi had access to pornographic magazines "and stuff that were his father's." (PCR-T. 271).

While the jury was aware that Mr. Tanzi was sexually molested as a child, the presentation of Mr. Martin at Mr. Tanzi's penalty phase would have given the jury a much greater appreciation for the depravity of the molester and the resulting trauma of the abuse. This was not a situation where Mr. Tanzi "started to become sexually involved with the older boy," as trial counsel would have it. This was an

abusive relationship between a predator and a young child. Not only did Mr. Martin exploit Mr. Tanzi sexually, he seemed to have no appreciation for the wrong he was doing. Rather than admit that his conduct was inappropriate and damaging, Mr. Martin simply chose to deny it. And when he could no longer deny what everyone knew, he attempted to minimize his conduct as "just kids fooling around." (PCR-T. 263). Had trial counsel adequately investigated and presented Mr. Martin's testimony, the jury would have had a greater appreciation for the suffering Mr. Tanzi endured, which is much more compelling mitigation evidence than simply asserting that Mr. Tanzi, based on his self-reporting, was sexually molested.

Additionally, Sean Martin recalled Mr. Tanzi's father being abusive. He witnessed one incident when Mr. Tanzi was in elementary school, when Tony slammed Mr. Tanzi's head against the side of his truck. (PCR-T. 256). As detailed above, Mr. Tanzi did not perform well in school, did not have many friends and got into a lot of fights which usually started with "name-calling." (PCR-T. 257-259). Nobody would defend Mr. Tanzi except Mr. Martin, "a couple of times." (PCR-T. 259). Mr. Martin recalled that Mr. Tanzi's mother "was not home that much" and frequently left Mr. Tanzi alone, unattended, while she was at work or out with boyfriends. (PCR-T. 261, 262).

Furthermore, trial counsel's presentation of Mr. Tanzi's mother, Phyllis Whalen was, at best, incomplete. While Ms. Whalen did testify at the penalty phase, her testimony lacked significant detail and served merely to minimize the mitigation that was presented. Her penalty phase testimony consisted mostly of identifying childhood photographs and giving short anecdotes about Mr. Tanzi's childhood difficulties.

At the evidentiary hearing, Ms. Whalen testified to the extent of the troubles in the Tanzi home. Mr. Tanzi's father had made it clear that he did not want to have a child. (PCR-T. 343). He was physically and verbally abusive to Ms. Whalen and Mr. Tanzi. (PCR-T. 342), to the extent that Ms. Whalen's mother found it necessary to interject: "How can I let him treat Michael like that?". (PCR-T. 361)

The abuse got even worse after Tony Tanzi was diagnosed with pancreatic cancer. Mr. Tanzi became more "disruptive, angry, getting into trouble." (PCR-T. 344) and his father reacted by being "very verbally abusive to him . . . He was angry. He was mean." (PCR-T. 344). Tony "would degrade Michael and scream at him." (PCR-T. 345). While she mentioned in the penalty phase an incident where Mr. Tanzi was beaten for not coming home in time for dinner, she did not give any details about the nature of the abuse. She explained at the evidentiary hearing that the spanking was "excessive." (PCR-T. 361) At the evidentiary hearing, she was

asked why Mr. Tanzi had failed to come home as instructed: he was "in the woods with Sean Martin." (PCR-T. 361)

At the evidentiary hearing, Ms. Whalen also explained in greater and more compelling detail how, from early childhood, Mr. Tanzi was "acting out," and was "temperamental". (PCR-T. 342). Mr. Tanzi wasn't doing well in school. Teachers thought he had ADHD. "He had a very short attention span. He was disruptive in class." (PCR-T. 346). Mr. Tanzi had almost no friends:

> Mike didn't get along with too many kids at all, you know. He was always angry or fighting with them over something . . . When he went out, it was always an argument, and there was always something going on.

(PCR-T. 346).[10] Kids in the neighborhood called him "gay boy" because he hung around with Sean Martin. (PCR-T. 370).

Ms. Whalen also gave a more compelling and detailed history of Mr. Tanzi's placements in mental health facilities. When Mr. Tanzi was 11 or 12, Ms. Whalen learned from psychiatrists at Pembroke Hospital that Mr. Tanzi had been sexually abused.[11]. (PCR-T. 349). He responded well in Mentor Program, there were male

[10] Again, all of these behaviors are consistent with the emotional, cognitive and developmental difficulties associated with 47,XYY Syndrome.

[11] Eventually, Ms. Whalen learned that it was Sean Martin who had sexually abused her son. When Ms. Whalen confronted Sean's parents, they were not surprised. Sean had been abused too, "and there's nothing they could say to me." (PCR-T. 352). As often happens with victims of abuse, Mr. Tanzi refused legal action against his abuser.

figures there who cared for him. (PCR-T. 349). Mentor tried to medicate him with Ritalin for his "acting out" and ADHD, but they said he needed residential treatment. (PCR-T. 350).

After a few weeks at Mentor, Mr. Tanzi was transferred to a residential facility in Brockton. (PCR-T. 350). They agreed Mr. Tanzi had been sexually abused. He acted out there as well. They were understaffed, so Ms. Whalen volunteered to take Mr. Tanzi to a meeting for sexual abuse victims. Mr. Tanzi didn't want to go in to the meeting, even after a counselor tried to coax him to go in. He slammed the car door and ran off. "He didn't want to face it . . . He didn't want to talk to people about anything that had happened to him." (PCR-T. 352)

While at the Pilgrim Center, Mr. Tanzi "had issues. He argued up there too . . . And he couldn't deal with his issues." They had problems with him fighting, attitudes. (PCR-T. 353-4). They sent him to a "permanent residence" called Brightside. (PCR-T. 354), where he stayed for about a year. Ms. Whalen signed Mr. Tanzi out of Brightside because "my father-in-law and my husband at that time, everybody said there was nothing wrong with Michael,". (PCR-T. 354) though the people at Brightside did not think it was advisable. (PCR-T. 355) Brightside was "until they wanted him to go" and "they didn't want him to go." (PCR-T. 369)

Mr. Tanzi subsequently came to live with Ms. Whalen and her husband in Taunton. He was edgy and made them nervous. (PCR-T. 355). After his arrest for making obscene phone calls, Mr. Tanzi was sent to a program in Middleborough. He did well there, graduating first in his small class. He completed that program and went to live at home again. (PCR-T. 356)

Mr. Tanzi "tried for a few weeks" before trouble started again. (PCR-T. 357) He was arrested for carjacking and served six months. (PCR-T. 358). At the time, Mr. Tanzi was smoking marijuana and using other drugs. He was living on the streets for a while, then moved in with a woman in "the projects." One night, Ms. Whalen got a call from her father-in-law and went to Whitman where she found Mr. Tanzi. He overdosed on his roommate's blood pressure pills trying to get high. (PCR-T. 358-59).

Ms. Whalen didn't hear from Mr. Tanzi for another six months, until he called on Christmas to say "I love you, and I want to say Merry Christmas and he told me where he was living." He was having a hard time. (PCR-T. 360).

Mr. Kuypers testified that he had spoken with Hampton Perkins, a neighbor of the Tanzi's, in Brockton, Massachusetts. Mr. Perkins was one of the few people in the neighborhood who showed care for Mr. Tanzi. Trial counsel felt that his testimony "could have been helpful . . . [b]y humanizing Mr. Tanzi. Giving us an

account of this child, of what Mr. Perkins knew about his childhood. Maybe some specific instances of his interaction with Mr. Tanzi." (PCR-T. 120).

Mr. Kuypers felt so strongly about the potential benefits of Mr. Perkins testimony that he would have called him as a witness even if his testimony was inconsistent with other evidence presented at the penalty phase. Even if Mr. Perkins had said that Mr. Tanzi and his father "got along just fine," that "there was no trouble in the household," or that he didn't notice any change in Mr. Tanzi after his father's death, Mr. Kuypers "would have called him anyway, if he wanted to come down." (PCR-T. 154-5). However, Mr. Kuypers never presented Mr. Perkins to the jury because "he didn't want to come. I offered him the opportunity to come and testify and he declined . . . [H]e just felt it was too much of an effort for him to do so given his age and apparent infirmity." (PCR-T. 121). And despite his belief that Mr. Perkins was a valuable witness, Mr. Kuypers made no effort to secure Mr. Perkins because he did not think Mr. Perkins would be cooperative if he did. (PCR-T. 122).

Mr. Perkins testified by telephone, under subpoena, at the evidentiary hearing. Mr. Tanzi grew up across the street from the Perkins family. (PCR-T. 284). Mr. Perkins stressed the importance of Mr. Tanzi doing well in school and getting good grades. On occasion, Mr. Perkins made a deal to take the young Mr. Tanzi out for breakfast if he did well in school and got a good report card.

(PCR-T. 287). When Mr. Tanzi got good grades, he showed his report card to Mr. Perkins and they had breakfast together. (PCR-T. 287).

Mr. Perkins admitted that he resisted traveling to Florida to testify at Mr. Tanzi's penalty phase. (PCR-T. 287). However, his reasons were not simply that "it was too much of an effort." Rather, Mr. Perkins explained that he would not come to Florida because of his aversion to flying. (PCR-T. 289). Had trial counsel made the effort to secure Mr. Perkins, they would have learned that he was not adverse to testifying, rather he was afraid of flying. Trial counsel could have, as postconviction counsel did, made alternate arrangements for travel to Key West, or for the presentation of Mr. Perkins's valuable mitigation testimony by teleconference, by perpetuation or other means. Instead, as Mr. Perkins pointed out, "They didn't make any other arrangements for me to testify." (PCR-T. 290).

Julia Perkins, Hampton's daughter, also testified at the evidentiary hearing to her experiences with Mr. Tanzi when he was a small child. (PCR-T. 295). Ms. Perkins recalled that Mr. Tanzi's father, Tony, was "stern." She recalled one incident where "his father grabbed him by the back and like kicked him in his bottom into the house." (PCR-T. 301). After Tony Tanzi's death, Ms. Perkins babysat Mr. Tanzi.

According to Ms. Perkins, "Mikey" cried a lot. (PCR-T. 295). He was often picked on by other neighborhood kids, who called him names. (PCR-T. 295). "It

could be after school or weekends or it just seemed like if they were outside playing and then it just turned into him crying or them teasing him." (PCR-T. 298). The young Mr. Tanzi would sometimes instigate problems with the other kids, but he was an "easy target." (PCR-T. 300). Moreover, Mr. Tanzi would rarely physically defend himself. (PCR-T. 298-9).

Ms. Perkins babysat for Mr. Tanzi until there came a time when he became defiant and would "not listen" to her anymore. (PCR-T. 303-4). Thereafter, Sean Martin babysat him. (PCR-T. 299). According to Ms. Perkins, Sean was also picked on and called names by the neighborhood kids also. (PCR-T. 300). Trial counsel made no effort to call Ms. Perkins.

The prejudice from counsel's failure to investigate and prepare additional mitigation is evident. As a result of the limited investigation, counsel failed to present the compelling mitigation that was available. The mitigation that was presented was incomplete and inconsistent. Had counsel adequately prepared and presented the mitigation case, Mr. Tanzi's jury would have heard all of the available mitigation including a complete and accurate assessment of Mr. Tanzi's mental health and testimony from the compelling lay witnesses, which is of greater quality and quantity than that presented at the penalty phase. It cannot be said that counsel's failure to investigate and prepare did not effect the outcome of Mr. Tanzi's penalty phase proceedings.

While the jury knew some of the history of Mr. Tanzi's psychological and emotional problems, the inconsistent theory presented through Dr. Vicary, whose own credibility was in question, left the jury with the impression that none of the mental health evidence was credible. As a result, the only explanation offered for Mr. Tanzi's difficulties was that he was "antisocial." Had trial counsel properly investigated and presented the evidence that Mr. Tanzi suffers from a chromosomal disorder which resulted in an abnormal genotype, the jury would have had a greater appreciation for these aspects of his character and conduct. Mr. Tanzi is not merely antisocial. Rather, as Dr. Dudley explained, "he's much more severely disturbed than antisocial." (PCR-T. 414)

Had Mr. Tanzi's sentencer heard that he suffers from a genetic condition, through no fault of his own, that contributed to his developmental difficulties and, ultimately, his mental illness and character, they would have understood that there is a physiological basis for the opinions of Mr. Tanzi's mental health experts, lending credibility to their conclusions. In addition, the experts, both of whom testified that Antisocial Personality Disorder has an unknown genetic component, would have had a basis on which to explain Mr. Tanzi's history of increased aggressiveness, impulsivity and behavioral problems. The existence of this condition would have provided a physiological explanation for Mr. Tanzi's mental and emotional difficulties which would have reinforced his experts' opinions

regarding mental health mitigation and provided powerful mitigation in its own right.

At the evidentiary hearing, Mr. Tanzi presented Dr. Karl Muench, a medical geneticist. Dr. Muench testified that he was asked to consult on Mr. Tanzi's case. (PCR-T. 16).[12] To that end, Dr. Muench reviewed some background materials and the cytogenetics testing report. (PCR-T. 17; Defense Exhibit 20). Dr. Muench explained that the cytogenetic testing report is an analysis of an individual's chromosomal makeup based on a visual photograph. Dr. Muench further explained that the chromosomes are "packets of genes." (PCR-T. 18) Every human being has approximately 25,000 genes arranged in 46 chromosomes. Id. The cytogenetics testing report indicates that Mr. Tanzi suffers from 47,XYY Syndrome. (PCR-T. 20) (Defense Exhibit 2).

As Dr. Muench explained, there are several physical aspects to 47,XYY Syndrome:

> The phenotype in XYY is subtle and consists of a syndrome of observable points, anyone of which by itself would not be totally outside of the normal range. For example, the height of an individual. Population wise, statistically the height of XYY individuals is greater than the height of XY individuals. But the height of any one individual with XYY ordinarily would be in the normal range.

[12] Dr. Muench was called to assist the Court in understanding the nature of 47,XYY Syndrome, but did not render an opinion regarding the presence or absence of mitigating factors.

(PCR-T. 24). [13]

Most significantly in Mr. Tanzi's case, while there is no apparent causal link between 47,XYY and criminal behavior, there is a well documented statistical link between 47,XYY and behavioral issues related to development. (PCR-T. 32). Dr. Muench explained:

> [T]here are numerous studies on behavioral aspects, again, in populations of XYY males, notably in school situations in which there is diminished socialization, increased problems with inner social skills, learning disabilities, impulsive behaviors, identifiable traits which would lead to placement in special school situations or which would lead to recommendation for a psychological evaluation or a psychiatric evaluation. There is a coming together of genetic foundations and environmental situations which interact.

(PCR-T. H. 44). Moreover, individuals with 47,XYY disorder have statistically been found to possess lower intelligence than the general population or their siblings and an approximately 15% decrease on IQ tests. (PCR-T. 31). In a follow up study of thirty-eight XYY boys, approximately 50% had documented psychological problems, indicating "considerably increased risks" for delayed language and motor development and psychiatric disorders such as autism. (PCR-T. 60-61).

[13] Dr. Muench explained that a "syndrome" represents the coming together of signs and symptoms related to a disease. (PCR-T. 20).Despite the circuit court's finding that 47,XYY is not a "syndrome as generally understood by psychiatrists and psychologists," the fact remains that 47,XYY Syndrome is a recognized genetic disorder among geneticists.

These are precisely the types of abnormal behaviors consistently presented throughout Mr. Tanzi's troubled history. Phyllis Whalen, Mr. Tanzi's mother, testified at length at the evidentiary hearing to Mr. Tanzi's inability to make friends, his ill temperament as a child, and how he would start fights and make problems. Sean Martin, a neighbor, testified similarly at the evidentiary hearing that Mr. Tanzi did not perform well in school and got into a lot of trouble. (PCR-T. 258). He also described Mr. Tanzi's difficulties with socialization. Mr. Tanzi did not have many friends in the neighborhood and got into a lot of fights. (PCR-T. 257, 259). Usually, the fights started with name calling. (PCR-T. 258) "With the fights . . . name calling back and forth . . . he didn't have too many friends." (PCR-T. 258-60). Michael was rude to other people in the neighborhood, and often brought the fights upon himself. Nobody would defend Mr. Tanzi except Mr. Martin. (PCR-T. 259).

Julia Perkins testified similarly that Mr. Tanzi was an emotional child who cried a lot. (PCR-T. 295). As he got older, he was increasingly difficult and "would not listen." (PCR-T. 303-4). While in the various mental health programs, Mr. Tanzi was described as "ADHD," hyperactive, and difficult. The testimony of Ms. Perkins, Ms. Whalen and Sean Martin regarding Mr. Tanzi's behavior, emotionality and dis-socialization as a child is consistent with the difficulties resulting from 47,XYY Syndrome, as explained by Dr. Muench.

Moreover, counsel's presentation of contradicting and inconsistent mental health theories prejudiced Mr. Tanzi. Richard Dudley, M.D., a psychiatrist, testified at the evidentiary hearing, that he evaluated Mr. Tanzi over a period of two full days. (PCR-T. 378). Dr. Dudley requested cytogenetic testing because of the indication of a chromosomal abnormality in both the records he reviewed and Mr. Tanzi's history. As a medical doctor with some training in genetics, Dr. Dudley recommended that an expert geneticist be consulted.[14]

In addition to the compelling evidence that Mr. Tanzi suffers from 47, XYY syndrome, Dr. Dudley made significant conclusions with respect to Mr. Tanzi's mental health. Dr. Dudley summarized his findings regarding Mr. Tanzi:

> Extremely difficult and traumatic childhood and early adolescence of the type that would tend to the development of significant psychiatric difficulties, that he has this XYY chromosomal abnormality that appears to be another risk factor for the development of similar difficulties, and that he as a result has developed fairly profound major psychiatric difficulties that have impaired his ability to function quite significantly over time.

(PCR-T. 381).

[14] On January 26, 2009, Mr. Tanzi filed a Motion for Order Directing Florida Department of Corrections to Collect and Deliver Blood Sample to an Independent Laboratory for Medical Testing. (Supp. PCR. 117-120) which was granted. (PCR. 262). Cytogenetic testing was performed by the University of Florida Cytogenetics Laboratory, which generated a report indicating that Mr. Tanzi suffers from 47,XYY Syndrome. (PCR-T. 20) (Defense Exhibit 2).

Dr. Dudley diagnosed Post Traumatic Stress Disorder (PTSD), Depressive Disorder NOS, Borderline Personality Disorder, Alcoholism, Polysubstance Abuse, Sexual Disorder NOS. (PCR-T. 382). He explained that PTSD is an anxiety disorder with the triggering events of the death of Mr. Tanzi's father and his perceptions of what was occurring at that time, and the abuse he was enduring at the same time. (PCR-T. 384) He explained:

> [H]e did not have a sense at the age of 8 that his father was actually dying, and so that when the death occurred, it was unanticipated. He was not prepared for it. The family had not talked about it. Even following the death, there was no real discussion of it. There was no real explanation of it. So he had a perception of the father being killed and really taken from him.

(PCR-T. 385). Dr. Dudley explained the significance of the sexual abuse:

> During this obviously stressful time, [the physical] punishments had been at a minimum obsessive, so there was some of that . . . also that's about the time that he began to be sexually abused as well.

(PCR-T. 385).

Dr. Dudley also explained that Mr. Tanzi suffers from Borderline Personality Disorder, "the most severe of the personality disorders". (PCR-T. 388). People with this disorder have extremely unstable attachment issues, frantically trying to connect with someone and not believing their connections will remain stable. (PCR-T. 389). They exhibit instability in their own understanding of who they are, instability in their mood, and chronic depressive sorts of moods. (PCR-

T. 389). Under stress they deteriorate into dissociative or brief psychotic states. "Its a very fragile personality structure." (PCR-T. 389)

In addition, the circumstances of the crime can be explained in part because of the rejection Mr. Tanzi experienced when abandoned in Miami:

> [H]e has all the features . . . this history of losses and rejection and abandonments, and lack of real certainty about any primary attachments that left him with major issues around attachments, a history of just kind of frantically trying to connect and have somebody there for him virtually at any cost, then having enormous difficulty when there were experiences that seemed to be being left again or being abandoned again just would send him into tail spins.

(PCR-T. 389-90).

Dr. Dudley stressed that Mr. Tanzi's psychiatric disorders were of a much more severe and consequential nature than had been previously presented:

> He was all over the place with no boundaries, no real sense of who he was, no real sense of identity. Did he want to be with his mother? Did he want to be his mother? Yeah, I mean, it was just very unclear, and it never really clarified. It just continued into his adult life. That kind of mood instability that was there as a child continued into his adult life as well, having difficulty sustaining that mood. And then, again, when he couldn't find those attachments or felt those rejections that he would just fall apart.

(PCR-T. 390).

As established at the evidentiary hearing, trial counsel failed to adequately prepare his mental health experts. As a result, no coherent, consistent picture of Mr. Tanzi's mental health and state of mind at the time of the crime was offered. Had counsel adequately investigated and prepared his experts, investigated the the

fact that Mr. Tanzi suffers from a 47,XYY Syndrome and adequately prepared and presented lay witness testimony, the jury could have been presented with a complete and accurate picture of Mr. Tanzi's mental health and would have been convinced that Mr. Tanzi deserved a sentence less than death.

ARGUMENT III

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING SEVERAL OF MR. TANZI'S MERITORIOUS POSTCONVICTION CLAIMS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Mr. Tanzi sought an evidentiary hearing pursuant to Fla. R. Crim. P. 3.851 and for all claims requiring a factual determination. Pursuant to Fla. R. Crim. P. 3.851(f)(5)(A)(i), an evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. *See also Amendments to Fla. R. Crim. P. 3.851*, 772 So. 2d 488, 491 n.2 (Fla. 2000) (endorsing the proposition that "an evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims which allege an ultimate factual basis"). *See also*, *Allen v. Butterworth*, 756 So. 2d 52, 66-67 (2000); *Gonzales v. State*, 990 So. 2d 1017, 1024 (Fla. 2008). To the extent there is any question as to whether the movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required. *Booker v. State*, 969 So. 2d 186, 195 (Fla. 2007).

"Postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record." *Connor v. State*, 979 So. 2d 852 (Fla. 2007). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996). A court's decision whether to grant an evidentiary hearing is subject to *de novo* review. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

As set forth below, Mr. Tanzi's rule 3.851 motion pled facts regarding the merits of his claim which must be accepted as true. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). When these facts are accepted as true, it is clear that the record does not positively refute Mr. Tanzi's claim and that an evidentiary hearing is required.

A. Juror Misconduct

In his motion for postconviction relief, Mr. Tanzi alleged that evidence of juror misconduct established that the outcome of Mr. Tanzi's sentencing phase was unreliable and violated his due process right to be tried by a fair and impartial jury under the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (PCR. 15-18). The lower court

erred in denying an evidentiary hearing on this claim, and erred in denying Mr. Tanzi the right to interview jurors to further investigate. (PCR. 309).

At Mr. Tanzi's penalty phase proceeding, trial counsel repeatedly objected to the state's introduction of evidence that Mr. Tanzi lacked remorse. (T. 1459, 1463, 1464, 1468, 1492-93, 1576). Trial counsel also objected when the state referred to Mr. Tanzi's "lack of remorse" in its closing argument. (T. 1669, 1724-25, 1733-34). During the charge conference, trial counsel requested a special jury instruction to the effect that lack of remorse was not an aggravator. (T. 1668). The state agreed that lack of remorse would not be argued. (T. 1669), and the court agreed to give the requested instruction. (T. 1675). However, the state argued in closing that Mr. Tanzi "tended to exhibit little to no remorse or guilt for his misbehavior in the community and talked about his misbehavior in a very matter of fact -- ," prompting a defense objection. (T. 1724-25). The court concluded the argument was not improper because lack of remorse was "one of the ways they conclude that he qualifies as a narcissistic personality," and noted he would be giving the instruction that lack of remorse was not an aggravator. (T. 1728). Ultimately, the court instructed the jury, "Lack of remorse is not an aggravating factor and you are not to consider it as such." (T. 1811).

Mr. Tanzi subsequently discovered that, despite the court's instruction, the jury did, in fact, improperly consider lack of remorse as the justification of its

recommendation that the court sentence him to death. After trial, an un-named juror explained the rationale for the jury's death recommendation:

> He didn't care. He had no regrets, no remorse. We spent 2 1/2 hours trying to find a way not to give him the death penalty.

Charles Rabin, "Confessed Murderer Gets Death Sentence," The Miami Herald, April 12, 2003. This juror's statement clearly demonstrates that the jury considered mitigating factors, but justified its ultimate death recommendation because Mr. Tanzi showed "no regrets, no remorse." Furthermore, the juror's comments to the Miami Herald demonstrate that lack of remorse was considered as an aggravator in its own right, and not merely as rebuttal evidence offered to support diagnoses of Conduct Disorder and Antisocial Personality Disorder, considered proper by the trial court and this Court on direct appeal.

The Sixth Amendment to the United States Constitution guaranteed Mr. Tanzi a fair and impartial jury. "A trial by jury is fundamental to the American scheme of justice and is an essential element of due process." *Scruggs v. Williams*, 903 F.2d 1430 (11th Cir. 1990). Implicit in the right to a jury trial is the right to an impartial and competent jury. *Tanner v. United States*, 483 U.S. 107, 126 (1987).

Florida law defines and limits the aggravating circumstances which may be considered by a jury to determine whether death is an appropriate punishment. See Fla. Stat. § 921.141(5). It is well settled that "lack of remorse is a nonstatutory aggravating circumstance and cannot be considered in a capital sentencing."

Shellito v. State, 701 So. 2d 837, 842 (Fla. 1997). Further, "it is error to consider lack of remorse for any purpose in capital sentencing." *Colina v. State*, 570 So. 2d 929, 933 (Fla. 1990), quoting *Trawick v. State*, 473 So. 2d 1235, 1240 (Fla. 1985).

Mr. Tanzi is being denied his rights under the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution because of the rules prohibiting Mr. Tanzi's lawyers from interviewing jurors to determine if constitutional error is present.

Florida Rule of Professional Responsibility 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial after the dismissal of the jury. This ethical rule, one which prevents Mr. Tanzi from investigating any claims of juror misconduct or bias that may be inherent in the jury's verdict, is unconstitutional on its face and as applied to Mr. Tanzi in postconviction proceedings.

Under the Sixth, , and Fourteenth Amendments, Mr. Tanzi is entitled to a fair sentencing with an impartial jury. Mr. Tanzi's inability to fully explore possible misconduct and biases of the jury prevents him from fully detailing the unfairness and unconstitutionality of their verdict. Moreover, under Article I, § 21 of the Florida Constitution, Mr. Tanzi is entitled to access to the Courts of this

State. The rule prohibiting juror interviews directly conflicts with Mr. Tanzi's ability to develop his claims and challenge his convictions before this Court.

In the present case, Mr. Tanzi believes that circumstances exist that indicate bias and a lack of impartiality on the part of his jury. The serious implications arising from the jury's conduct cannot be resolved by a review of the record and/or questioning of trial counsel alone. Juror interviews must occur to ensure due process occurred at Mr. Tanzi's trial. See *Smith v. Phillips*, 455 U.S. 209, 217 (1982)(finding "due process means a jury capable and willing to decide the case solely on the evidence before it.")

Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, is invalid because it is in conflict with the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. It unconstitutionally burdens the exercise of fundamental constitutional rights, including Mr. Tanzi's rights to due process, see *Smith v. Phillips*, 455 U.S. 209, 217 (1982)(finding "due process means a jury capable and willing to decide the case solely on the evidence before it"); *Turner v. Louisiana*, 379 U.S. 466 (1965)(finding "[t]he right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors"), and access to the courts of this State under Article I § 21 of the Florida Constitution.

B. The State Violated *Brady v. Maryland*

Mr. Tanzi alleged in his motion for postconviction relief that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to timely disclose evidence that Mr. Tanzi suffers from a genetic disorder. The circuit court summarily denied this claim because "Defendant acknowledged that the State did disclose this possibility before trial. As such, this Court find [*sic*] that there was no *Brady* violation and denies an evidentiary hearing on this subclaim." (PCR. 311). This was error.

In order to prove a violation of *Brady*, a claimant must establish that the government possessed evidence that was suppressed, that the evidence was "exculpatory" or "impeachment" and that the evidence was "material." *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. 263 (1999). Evidence is "material" and a new trial or sentencing is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. *Kyles*, 514 U.S. at 433-434; *Hoffman v. State*, 800 So. 2d 174 (Fla. 2001); *Rogers v. State*, 782 So. 2d 373 (Fla. 2001); *Young v. State*, 739 So. 2d 553 (Fla. 1999). When examining a *Brady* claim, courts have a " '[ ] duty to search for a constitutional error with painstaking care [which] is never more exacting than it is in a capital case'." *Kyles*, 514 U.S. 419, 422 (1995) . When exculpatory

evidence is disclosed during trial, a *Brady* violation occurs "if the material came so late that it could not be effectively used." *United States v. Beale*, 921 F.2d 1412, 1426 (11th Cir. 1991).

On February 7, 2003, just three days before Mr. Tanzi's penalty phase was to begin, the state issued its disclosure memorandum to trial counsel regarding the possibility that Mr. Tanzi might suffer from a chromosomal disorder. The state's eleventh-hour disclosure of this information constitutes a violation of their duty to timely disclose information favorable to the defense. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Beale*, 921 F.2d 1412 (11th Cir. 1991).

The evidence adduced at trial, and records provided to counsel, indicate that FDLE had conducted testing on Mr. Tanzi's blood years prior to the state's disclosure. The state had or knew of material exculpatory evidence and failed to turn it over to defense counsel until after Mr. Tanzi had already plead guilty, and a mere three days before Mr. Tanzi's capital sentencing phase was to begin. Because of the late disclosure of this information, trial counsel was unable to do the necessary research and investigation, contact the necessary experts and conduct necessary medical testing to determine whether Mr. Tanzi does, in fact, meet the diagnosis for 47,XYY Syndrome.

The state's failure to timely disclose such evidence renders a trial fundamentally unfair. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v.*

Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985); *Kyles v. Whitley*, 115 S. Ct. 555 (1995). Mr. Tanzi was prejudiced as a result. Mr. Tanzi does, in fact, suffer from 47,XYY Syndrome. There is a well documented statistical link between 47,XYY and behavioral issues related to development and intelligence, including precisely the types of disorders Mr. Tanzi has presented throughout his troubled life. Had the jury known that Mr. Tanzi suffers from 47,XYY Syndrome, a chromosome disorder that compromised his development, there is, at the very least, a reasonable probability that the result of the penalty phase would have been different.

Furthermore, the acts and/or omissions by the state in disclosing favorable evidence prejudiced Mr. Tanzi by rendering trial counsel's performance prejudicially ineffective. Had counsel been aware prior to Mr. Tanzi's guilty plea that Mr. Tanzi suffers from a chromosomal disorder, counsel would have advised that a guilty plea was not in his best interest. This evidence bears not only on his culpability, but is also substantial mitigation. Certainly, Mr. Tanzi had a right to know this information, and the effect it would have on a jury's consideration of Mr. Tanzi's guilt and punishment, before entering a plea. Because the state withheld evidence that Mr. Tanzi suffers from a genetic disorder that would have made a difference in the eyes of the jury both at guilt and sentencing phases, Mr. Tanzi's decision to plead guilty was not knowingly and intelligently made.

Trial counsel's failure to raise this issue immediately upon the state's untimely disclosure constitutes ineffective assistance. See Argument II.

Mr. Tanzi was prejudiced as a result of trial counsel's ineffective assistance, and the state's withholding of exculpatory information. Had this additional exculpatory and mitigating information been presented to Mr. Tanzi's judge and jury, the result of Mr. Tanzi's capital sentencing would have been different. The trial court found several mitigating factors, including Mr. Tanzi's Axis II personality disorders, his history of institutionalization as a youth, sexual abuse as a child, his history of substance abuse, but afforded all of these mitigating factors little or "some" weight. (R. 1804-1832). Had Mr. Tanzi's sentencer heard that he suffers from a genetic condition, through no fault of his own, that contributed to his character and the circumstances of the offense, they would have understood that there is a physiological basis for the opinions of Mr. Tanzi's mental health experts, lending credibility to their conclusions. In addition, the experts, both of whom testified that Antisocial Personality Disorder has an unknown genetic component, would have had a basis on which to explain Mr. Tanzi's increased aggressiveness, impulsivity and behavioral problems. The existence of this condition would have provided a physiological explanation for Mr. Tanzi's mental and emotional difficulties which would have reinforced his experts' opinions regarding mental health mitigation, and provided powerful mitigation in its own

right. It cannot be said that the state's failure to disclose this mitigation information, and trial counsel's failure to investigate and present it, did not prejudice Mr. Tanzi.

C. Mr. Tanzi Was Deprived Of His Right To Effective Assistance Of Counsel At The *Spencer* Hearing

Counsel's failings continued into Mr. Tanzi's *Spencer* hearing. Having received a jury recommendation of death by a 12-0 vote, trial counsel had one last opportunity to present additional mitigation before the court issued its sentence. Despite having this opportunity, trial counsel presented no additional witnesses and little additional evidence.

The *Spencer* hearing transcript is less than 21 pages in length. The first 7 pages record a discussion about paying experts' fees, returning evidentiary photographs to family members, and the consideration of letters written to the Court (R2214-2220). The next three pages record trial counsel's reading of a letter to the Court from Mr. Tanzi's mother pleading for his life. (R. 1220-1222). Over the next three pages, counsel submits statements of Ms. Acosta's family and long-time boyfriend, offered to show that Ms. Acosta opposed the death penalty. Counsel then admits, "I'm not sure how – This is my first time doing one of these hearings." (R. 2225), before briefly stating what the Court had already heard regarding Mr. Tanzi's background and mental illness. Lastly, Mr. Tanzi read his own prepared statement to the Court. (R. 2228-2232).

The circuit court summarily denied this claim because "Defendant does not identify the additional evidence of witnesses that could have been presented." (PCR. 311). Contrary to the lower court's finding, in Mr. Tanzi's rule 3.851 motion he specifically stated what additional evidence could have been presented:

> Additional experts could have been presented to the Court to substantiate Mr. Tanzi's mental illness and cognitive difficulties. Trial counsel could have presented the testimony of Drs. Mate and Golden, who had evaluated Mr. Tanzi prior to trial, and whose opinions Dr. Raphael relied upon when forming his own opinion. Trial counsel could have presented any of the numerous mental health experts, friends, associates or family who had intimate knowledge of Mr. Tanzi's background. Trial counsel could have presented evidence to substantiate Mr. Tanzi's genetic disorder. Instead, trial counsel chose to present no additional witnesses, and no additional evidence of any substance. As a result, the Court had no additional evidence to justify any departure from the jury's recommendation that Mr. Tanzi be sentenced to die.

(PCR. 44). Mr. Tanzi was entitled to an evidentiary hearing on this claim, and thereafter, relief.

D. Trial Counsel Was Laboring Under A Conflict Of Interest

Much of counsel's failings may be explained by the nature of the attorney/client relationship and the conflicts that arose during counsel's representation of Mr. Tanzi. The Supreme Court in *Strickland* explained the duties of counsel with respect to avoiding conflicts of interest:

> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See *Cuyler v. Sullivan*, 446 U.S., at 346, 90 S. Ct., at 1717. From counsel's

> function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.

Strickland v. Washington, at 688.

After pleading guilty and waiving his right to an advisory jury at the penalty phase, Mr. Tanzi sought to withdraw his plea and voiced concern about his attorneys' performance. Mr. Tanzi alleged that he and trial counsel Ms. Rossell "were engaged in some sexual activity" and that he had complained to the Florida Bar about it. (R. 2045). Mr. Tanzi also complained about the quality of his counsel's assistance. Id.

Later that day, at the suggestion of both parties, the Court conducted a *Nelson*[15] inquiry. (R. 2063). Mr. Tanzi was duly sworn, and stated that he had threatened to kill his attorneys on several occasions because he was not satisfied with their performance. Mr. Tanzi stated that other attorneys were advising him that his counsel was not being truthful with him regarding his plea and waiver of his right to a jury recommendation at sentencing. (R. 2065). The Court gave Ms. Rossell the opportunity to respond:

> MS. ROSSELL: [T]here were instances when I was meeting within an attorneys' room with Mr. Tanzi within A Dorm, which is glass and he would, to the best of my sense, begin masturbating. I

[15] *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973).

would turn my back – I never observed this, but I observed what I believed to be that going on – turned by back and asked to be let out of the room at that point.

There is no sexual relationship between myself and Mr. Tanzi. He has never grabbed me. To my recollection or knowledge, I've never – you know, there's just absolutely nothing to that. He has whatever problem he has controlling himself in the presence of certain people, but as soon as there – oh, and after that had happened twice, I ceased meeting with him one-on-one and either had an investigator with me or met with him only through the flap in his door, where he's remained in solitary confinement. That's the way we've conversed for at least as long as this Court has had this case, is through the food flap to avoid any such problems again.

THE COURT: Do you feel that's going to interfere with you being effective counsel for him?

MS. ROSSELL: I've about had it with this. This is – I'm angry right now. And I was angry the last time, but I think somehow I'm angrier now. I think I would like to have a few minutes before I answer that questions, because, as I just said to Mr. Kuypers, I've about had it right now.

* * *

In my opinion, his attacks on me, his statements, his threats, his, you know, lies, have not, in my opinion, at this stage of the game, I can say I believe that it has not affected my ability to represent him properly. And I hope that's later reflected in the opinions of others and in the record. Maybe I don't have the perspective I need on this right now, but I believe that to be the case, Judge.

(R. 2072-3).

Clearly, Ms. Rossell was laboring under a conflict of interest. Ms. Rossell not only disputed her client's sworn statements to the Court, she went so far as to

call him a liar, and express her anger at him. Most significantly, she admitted that she was not able to communicate with Mr. Tanzi face-to-face, in a manner that would be necessary to effectively inform him about his rights and the status of his case.

Prejudice is presumed when counsel is burdened by an actual conflict of interest. *Cuyler v. Sullivan*, 446 U.S., at 345-350, 100 S. Ct., at 1716-1719. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. *Strickland*, at 692. Given the complicated issues to be discussed with a capital defendant, and the sensitive nature of the evidence to be presented in Mr. Tanzi's penalty phase, communicating with the client through the food flap of the cell door was not appropriate. Having communicated with Mr. Tanzi this way, it is not a surprise that there would be confusion and misunderstanding when Mr. Tanzi was being advised regarding the consequences of his plea and waiver of a jury recommendation at penalty phase.

E. Florida's Lethal Injection Statute And The Existing Lethal Injection Procedures Violate The Eighth Amendment To The United States Constitution And Article I, Section 17 And Article II, Section 3 Of The Florida Constitution; The Statute And Procedures Constitute Cruel And Unusual Punishment

Mr. Tanzi sought an evidentiary hearing on his claim challenging Florida's lethal injection procedures. (PCR. 51-72). The circuit court denied Mr. Tanzi an evidentiary hearing, relying in part on this Court's decisions in *Tompkins v. State*,

994 So. 2d 1072, 1080-82 (Fla. 2008); *Walton v. State*, *3* So. 2d 1000, 1011-13 (Fla. 2008)*; Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007). (PCR. 312).

Mr. Tanzi is aware of this Court's decisions rejecting challenges to lethal injection, *e.g. Schwab v. State*, 969 So. 2d 318 (Fla. 2007). Mr. Tanzi is also aware that this Court has rejected the general notion that each litigant is entitled to his own hearing. *See Tompkins v. State*, 994 So. 2d 1072 (2008). Nevertheless, Mr. Tanzi seeks an evidentiary hearing at which he would have the assistance of counsel, the opportunity to present evidence and challenge evidence, as well as present evidence that has not been heard in any court in Florida.

A lethal injection challenge involves first a resolution of factual issues, and then second the application of the legal standard, which was most recently enunciated in *Baze v. Rees*, 128 S. Ct. 1520 (2008). Importantly, neither *Baze* nor *Lightbourne* constitute a ruling that regardless of what facts are found by the trier of fact, Florida's lethal injection procedure is constitutional. As such, the circuit court erred in refusing to grant Mr. Tanzi an evidentiary hearing on his challenge to Florida's lethal injection procedure in light of the Diaz execution. The proper remedy is to remand so that Mr. Tanzi can be provided with the same opportunity that was extended to Mr. Lightbourne - the opportunity to present the evidence supporting his facially sufficient challenge to Florida's lethal injection procedure.

This Court should reverse and remand the summary denial of Mr. Tanzi's lethal injection claim.

The decision in *Baze v. Rees* turned wholly on Kentucky's written protocol. While the *Baze* decision addresses some of the questions raised by Mr. Tanzi, it by no means forecloses consideration of important questions that *Baze* left open. Among the issues to be decided is whether Florida's written protocol is "substantially similar" to Kentucky's. The question of whether Florida's protocol is substantially similar to Kentucky's, however, is a question of fact that can only be answered after considering both the similarity of drugs to be used and how Florida's written protocol will actually be carried out. Significantly, the *Baze* opinion left open the important question of whether a protocol that is constitutional on its face may violate the Eighth Amendment when it is not carried out as written. Florida's unique history of deviating from written execution protocols reveals the gravity of the question of whether a protocol that is constitutional on its face may violate the Eighth Amendment when it is not carried out as written. *See, e.g., Davis v. Florida*, 742 So. 2d 233 (Fla. 1999); *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999).

Now that the high Court has better defined the standards by which an Eighth Amendment method-of-execution challenge may be established, Mr. Tanzi seeks the opportunity to litigate and prove his claim.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. TANZI'S MOTION TO AMEND HIS RULE 3.851 MOTION WITH ADDITIONAL CLAIMS

Mr. Tanzi filed his amended Motion to Vacate Judgments of Conviction and sentence on February 12, 2009. In that motion, Mr. Tanzi specifically requested leave to amend upon the completion of public records litigation and disclosure of additional public records. (PCR. 73). On July 24, 2009, Mr. Tanzi filed a Motion for Leave to Amend with an attached Amendment on July 24, 2009. (PCR. 325-358). In the amendment, Mr. Tanzi alleged that 1) newly discovered evidence establishes that the forensic science used as evidence to support Mr. Tanzi's death sentence was neither reliable nor valid, thus depriving him of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and 2) that he was deprived of his right to confront testimonial evidence used against him at his capital trial, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The motion for leave to amend also established that it was timely and that good cause to allow the amendment was shown. The State responded to the motion. (PCR. 359) and the lower court conducted a hearing on July 30, 2009. (PCR-T. 84).

On August 13, 2009, the court issued its "Order [*sic*] Defendant's Motion for Leave to Amend" denying leave to amend. (PCR. 392). The circuit court's

denial of leave to amend, and/or denial of the merits of Mr. Tanzi's claims was error. The circuit court's order does not address the timeliness or good cause requirements set forth in Fla. R. Crim. P. 3.851. Rather, the order summarily denies the claims and concludes that the Motion for Leave to Amend should be denied. The question of whether Mr. Tanzi should be granted leave to amend and the question of the merits of the amendment are two separate inquiries. Mr. Tanzi submits that his motion for leave to amend should have been granted as it met the requirements for amendment pursuant to rule 3.851. Mr. Tanzi also submits that the court erred in summarily denying his amendment claims, as set forth below.

A. Newly Discovered Evidence Establishes That the Forensic Science Used As Evidence To Support Mr. Tanzi's Death Sentence Was Neither Reliable Nor Valid, Thus Depriving Him Of His Rights Under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

In his amended motion, Mr. Tanzi alleged that in 2006, pursuant to a Congressional charge, the National Academy of Sciences formed a committee to study issues regarding the varied disciplines that form the field of "forensic science." Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006, P.L. No. 1-9-108, 119 Stat. 2290 (2005). The Committee on Identifying the Needs of the Forensic Science Community (Committee), led by the Honorable Judge Harry T. Edwards, U.S. Court of Appeals for the D.C. Circuit, and Dr. Constantine Gatsonis, Professor of Biostatisics at Brown University and

the founding Director of the Center for Statistical Studies, heard testimony from many different players from within, and outside, the criminal justice system: federal agency officials; academics and research scholars; private consultants; federal, state, and local law enforcement officials; scientists; medical examiners; a coroner; crime laboratory officials from public and private sectors; independent investigators; defense attorneys; forensic science practitioners; and leadership of professional and standard setting organizations.

The end product of the Committee's exhaustive work was a comprehensive report, a prepublication copy of which was made available on February 18, 2009. Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (Pre-publication copy) (hereinafter "NAS Report"). The Committee's final report constitutes newly discovered evidence that the "scientific" evidence used to convict Mr. Tanzi was the result of methods with questionable and untested underlying scientific principles, in violation of Mr. Tanzi's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.[16]

[16] This Court has recognized that "reports" issued by governmental or other bodies that affect the integrity of a defendant's trial or penalty phase can constitute newly discovered evidence. *See Trepal v. State*, 846 So. 2d 405, 409-10 (Fla. 2003) (relinquishing jurisdiction in Mr. Trepal's pending appeal in order to permit

The term "forensic science" encompasses a broad range of disciplines, each having its own set of technologies and practices. NAS Report at S-5. A wide range of "variability exists across forensic science disciplines with regard to techniques, methodologies, reliability, error rates, reporting, underlying research, general acceptability, and the educational background of its practitioners." *Id.* The level of scientific development and evaluation varies substantially among the forensic science disciplines whether laboratory based (e.g., DNA analysis, toxicology) or based on interpretation (e.g., writing samples, toolmarks, and fiber specimens). *Id.* at S-5. Therefore, the Committee suggested two important questions that should underlie the admission of, and reliance upon, forensic evidence in criminal trials:

> (1) the extent to which a particular forensic discipline is founded on a reliable scientific methodology that gives it the capacity to accurately analyze evidence and report findings and (2) the extent to which practitioners in a particular forensic discipline rely on human interpretation that could be tainted by error, the threat of bias, or the absence of sound operational procedures and robust performance standards.

Id. at S-7. The Committee specifically noted that it "matters a great deal whether an expert is qualified to testify about forensic evidence and whether the evidence is sufficiently reliable to merit a fact finder's reliance on the truth that it purports to support." *Id.*

Mr. Trepal to file an amended rule 3.850 based on the newly discovered information contained in the Department of Justice's Inspector General's Report).

The Committee detailed many of the problems inherent in various forensic sciences. In an effort to remedy the many flaws, the Committee made a number of specific recommendations for improving the many deficiencies within the forensic science community as a whole.

The Committee recommended that standard terminology to be used when reporting and testifying about a particular forensic science and establish model laboratory reports for the different disciplines, indicating the minimum information to be included. NAS Report at S-15, 16. The Committee pointed out that many terms are used to describe the degrees of association between evidentiary material and particular people or objects, e.g., "match," "consistent with," "identical," "similar in all respects tested," and "cannot be excluded as the source of." *Id.* at S-15. The Committee concluded that "[t]he use of such terms can and does have a profound effect on how the trier of fact in a criminal or civil matter perceives and evaluates scientific evidence." *Id.* Essentially, the use of varying degrees of terms results in the difference between being convicted or not.

Mr. Tanzi's trial exemplifies many of the concerns raised by the Committee in this regard. The testimony regarding forensic science evidence at Mr. Tanzi's trial, specifically regarding evidence of a blood stain which was found on the pocket of the victim's pants, was fraught with subjective terms and varying degrees of conclusiveness. FDLE DNA Analyst Robyn Ragsdale testified that the DNA

obtained from the victim's pants pocket "matched" Mr. Tanzi's DNA profile. (R. 807). Ragsdale also testified that the same blood stain contained a minor component of DNA which "matched or was consistent with the profile of Janet Acosta." (R. 808).

On cross examination, when asked again about the mixed nature of the sample, Ragsdale offered conflicting testimony that "Janet Acosta in that particular mixture was or could have been the other person." (R. 814). Ragsdale reached this conclusion despite the fact that she was only able to identify 1 out of the standard 13 areas of identification normally utilized to obtain a DNA profile. Ragsdale was forced to admit that "there was not enough to obtain a profile." (R. 814).

Despite the fact that there was no evidence to support a conclusion with any degree of certainty as to whether the blood stain originated on the outside or inside of the pants pocket, or the origin of that mixed sample of blood, Ragsdale testified that the DNA profiles "obtained from Mr. Tanzi and the jeans match," that "Ms. Acosta could not have been the donor of this [particular] DNA profile," and that Mr. Tanzi "matched" the DNA profile from Ms. Acosta's jeans as well as the amelogenin. (R. 812).

Dr. Hunter, a medical examiner who had not performed the autopsy of Ms. Acosta, similarly testified that Ms. Acosta suffered vaginal injuries that were "consistent with her having sustained a sexual battery or rape." (R. 891) "It is what

I would consider to be a fresh injury, meaning it's recent, but as far as a time frame goes, that about the best that I can get." (R. 908-9). Dr. Hunter's testimony is suspect not only because of the vague and unqualified terms he used, but because he based his opinion on the reports of Dr. Li, the physician who actually performed the autopsy on Ms. Acosta, but was not a forensic pathologist.

The use of the terms such as "match" and "was consistent with," caused the trial court and the jury to believe the State presented something more than circumstantial evidence against Mr. Tanzi to establish that he committed sexual battery against Ms. Acosta. The unqualified, non-standard terminology used by DNA Analyst Ragsdale regarding the mixed sample found on the victim's jean pockets, and similarly suspect testimony of Dr. Hunter, affected the trial judge and jury's perception of the reliability of the science presented. Such terminology, some of which is precisely the terminology criticized by the Forensic Science Committee's report, was relied on by the State in closing arguments to the jury, and ultimately by the Court in sentencing Mr. Tanzi to death:

> The Monroe County Medical Examiner testified that the victim had suffered a vaginal tear before her death. He testified that that this tear was consistent with the victim having had a nonconsensual sexual assault before her death. He also testified that the DNA of blood found on the inside surface of the victim's pants pocket matched the Defendant's. The location of the blood stain leaves no other explanation other than the victim's jeans had been partially removed at some point and that the Defendant had bled inside of his victim's pants.

* * *

> Thus, in addition to the admitted sexual battery of the forced oral sex in Florida City, a second sexual battery was committed when the Defendant united an object with the victim's vagina against her will.

(Sentencing Order, R. 1808-9).

The Committee also recommended that "research is needed to address issues of accuracy, reliability, and validity in the forensic science disciplines." NAS Report at S-16. The Committee points out that "some forensic science disciplines are supported by little rigorous systematic research to validate the discipline's basic premise and techniques." *Id.* The Committee noted that "With the exception of DNA analysis . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." *Id.* at S-5.

Mr. Tanzi's case demonstrates that the Committee's concerns are well founded. FDLE Analyst Robin Ragsdale was presented to testify that, in her opinion and the opinion of others, the blood stain in the victim's pants pocket "appeared to came from the inside of the pocket next to the person's body, not from the inside of the pocket like if you had your hand in the pocket." (R. 820). This opinion was not based on any systematic research to determine the validity of such an interpretation. Rather, Ragsdale reached this conclusion because:

> with practical experience you can look at an exhibit and see just from life experience and see which way the stain most likely came in contact with the exhibit."

(R. 820). Such unscientific methods reveal not only that Ragsdale was not trained or qualified to reach such a conclusion, they also reveal that no standards to be applied in making such a finding. Despite the lack of standards, Ragsdale was presented as a scientist, allowing the jury to believe that this finding was arrived at by scientific method and means.

Specifically regarding DNA evidence, the Committee cautioned that:

> The simple reality is that the interpretation of forensic evidence is not always based on scientific studies to determine its validity. This is a serious problem. Although research has been done in some disciplines, there is a notable dearth of peer-reviewed, published studies establishing the scientific bases and validity of many forensic methods.

Id. at S-6. Therefore, "research is needed to address the issues of accuracy, reliability, and validity in the forensic science disciplines." *Id.*

The Committee specifically addressed the problems associated with the reliance on DNA evidence. Despite the fact that the science of DNA is generally accepted, "there may [still] be problems in a particular case with how the DNA was collected, examined in the laboratory, or interpreted, such as when there are mixed samples, limited amounts of DNA, or biases due to the statistical interpretation of data from partial profiles." Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, Strengthening

Forensic Science in the United States: A Path Forward, at 3-12 (2009) (Pre-publication copy) (NAS Report). Additionally, the second step of the DNA testing process relies upon "the calculation of population frequency statistics and population genetics." *Brim v. State*, 695 So. 2d 268, 270 (Fla. 1997). "Accordingly, calculation techniques in determining and reporting DNA population frequencies must [then] also satisfy the *Frye* test." *Id.*

The testimony of Robyn Ragsdale in Mr. Tanzi's case demonstrates the concerns of the Committee. When testifying at trial specifically in reference to the sample taken from the jean's pocket of the victim, Ragsdale's stated she "found the presence of a mixture…" which contained "both a major and a minor component, meaning one had a lot more DNA there than the other." (R. 807). Ragsdale testified that she was able to "determine that that matched the profile of Michael Tanzi at all 13 STR loci and that the frequency of that profile for unrelated individuals in the following population was approximately one in 12 quadrillion Caucasians, one in 410 quadrillion African Americans, and one in 12 quadrillion Southeastern Hispanics." (R. 807).

Despite the fact that she obtained a mixed sample, Ragsdale nonetheless testified to the validity of the interpretations of the DNA analysis which was performed as to *both* portions of the sample. At no time was the accuracy, reliability and validity of the methods used by the State to analyze this evidence

ever challenged at Mr. Tanzi's trial. Indeed, the State presented to the jury an aura of infallibility and conclusiveness in all aspects of the DNA analysis process which, as the NAS Report explains, is contrary to the reality of this particular field of scientific evidence. As a result, Mr. Tanzi's jury was presented with evidence offered in support of the sexual battery aggravating circumstance which was neither properly substantiated under principles of *Frye*, nor those of the National Academy of Sciences.

Like other specialties within the broader field of forensic science, DNA analysis evidence is subject to challenge. Notwithstanding the fact that courts have routinely admitted such evidence, the NAS Report establishes the limitations of DNA, specifically evidentiary reliance mixed DNA samples. There is no doubt that the DNA evidence made a powerful impact on the jury. "[T]he probative power of DNA typing can be so great that it can outweigh all other evidence in a trial . . . " *Hayes v. State*, 660 So. 2d 257, 263-64 (Fla. 1995). The Court relied specifically on unchallenged, yet unreliable, DNA evidence when sentencing Mr. Tanzi to death (R1808-9).

In addition, the Committee recommended that all forensic laboratories and facilities should be removed from the administrative control of law enforcement agencies and prosecutor's offices:

> forensic scientists should function independently of law enforcement administrators . . . Because forensic scientists often are driven in their

> work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.

NAS Report at S-17.

Independence is essential so that the laboratory would be able to "set its own priorities with respect to cases, expenditures and other issues" *Id.* at 6-1. This independence was absent in Mr. Tanzi's case as the Florida Department of Law Enforcement was responsible for the majority of the forensic testing.

It is clear that FDLE analysts investigating the homicide of Ms. Acosta were not acting independently of law enforcement or the State Attorney's Office. In fact, analysts who should have been acting independently were actually working at the instructions of police and prosecutors. Linda Foster, FDLE analyst, testified in deposition that when considering whether to continue processing the crime scene or waiting until the following morning, she ""wasn't the one making the final decision…I mean, we do what we're asked to by the agency." (Foster Deposition at 10). Foster also indicated that latent print evidence from Ms. Acosta's van was not processed because law enforcement and prosecutors instructed her not to:

> Q: I guess this is sort of a general policy question too. Do you make decisions as to requesting certain analyses?
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> A: We get with the detective from the scene, whoever is in charge, and we get with them and we talk with them and tell them what we suggest. They tell us what the want, and then we decide which section it's going to be sent to.

> Q: And I'm not trying to make trouble for you, but did you ever recommend to anyone that the van or the items taken from it be further processed in some way?
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> A: It was all there. It could still be done, for that matter, but I was told by the state attorney not to do it at this time.

(Foster Deposition at 24).

Foster's deposition testimony demonstrates that the Committee's concerns are well founded. As the NAS Report warns, forensic scientists often do not act with the independence necessary to reach objective, scientifically valid results.

The Committee further recommends that NIFS encourage "research programs on human observer bias and sources of human error in forensic examinations." *Id.* at S-18. "[I]nitial and striking research has uncovered the effects of some biases in forensic science procedures, but much more must be done to understand the sources of bias and to develop countermeasures." *Id.* at 6-2. An example of such research would be "studies to determine whether and to what extent the results of forensic analyses are influenced by knowledge regarding the background of the suspect and the investigator's theory of the case." *Id.* at S-18.

The Committee described some common forms of cognitive bias: "how the common desire to please others (or avoid conflict) can skew one's judgment if coworkers or supervisors suggest that they are hoping for, or have reached, a particular outcome"; and the related "tendency for conclusions to be affected by how a question is framed or how data are presented." *Id.* at 4-9. The Committee

suggested that some principles employed in other fields, e.g., blinding, could be useful.

Dr. Hunter's testimony regarding how he came to the conclusion that Ms. Acosta was sexually assaulted demonstrates the concerns of the Committee when addressing the issue of how data can be skewed to reach an otherwise unsupportable conclusion:

> DR. HUNTER: Well, as a forensic pathologist, I don't work in a box. I use all the information that is provided to me through my review of the case, and my opinion is based not simply on the fact that there is an injury in that location, but that you have a severely beaten, strangulated individual that has a vaginal laceration. So my conclusion is that that is an injury, you know, associated with someone who has such tremendous other injuries, has to be viewed as an injury from a sexual assault."

(R. 910). It is clear from Dr. Hunter's testimony that he did exactly what the Committee specifically warns us of: he first formed his opinion that the victim had been sexually assaulted, and then, when the medical evidence did not support that conclusion, he relied on extraneous facts to support his biased hypothesis.

The Committee Report also describes the problems associated with forensic scientists connecting evidence to one particular suspect; if, for example, they are "asked to compare two particular hairs, shoeprints, fingerprints—one from the crime scene and one from a suspect—rather than comparing the crime scene exemplar with a pool of counterparts." NAS Report at 4-8, 4-9. Forensic scientists that "sit administratively in law enforcement agencies or prosecutors' offices, or

who are hired by those units, are subject to a general risk of bias." *Id.* at 6-2. This bias is exacerbated when the lab is under the control of law enforcement as mentioned above. The effect is that law enforcement's investigative bias migrates to the laboratory and evolves into scientific bias. This ultimately results in unreliable scientific evidence and unreliable trials.

In Mr. Tanzi's case, the prosecution developed its theory of the case and instructed forensic analysts to uncover evidence to support that theory. Operating under the biased assumptions offered by the prosecutor, analysts found evidence to support the prosecution, and ignored evidence that was inconsistent with the State's theories of guilt and aggravation.

The Committee recommends that laboratory accreditation and individual certification of forensic science professionals should be mandatory. NAS Report at S-19. Additionally, the Committee recommends that

> Forensic laboratories should establish quality assurance and quality control procedures to ensure the accuracy of forensic analyses and the work of forensic practitioners. Quality control procedures should be designed to identify mistakes, fraud, and bias; confirm the continued validity and reliability of standard operating procedures and protocols; ensure that best practices are being followed; and correct procedures and protocols that are found to need improvement.

NAS Report at 7-19. The Committee noted that "Accreditation is just one aspect of an organization's quality assurance program, which should also include proficiency testing where relevant, continuing education, and other programs to

help the organization provide better overall services." *Id.* at 7-2. The Committee also cautioned that "accreditation does not mean that accredited laboratories do not make mistakes, nor does it mean that a laboratory utilizes the best practices in every case, but rather, it means that the laboratory adheres to an established set of standards of quality and relies on acceptable practices within these requirements." *Id.*

As to individual certification of forensic science professionals, the Forensic Science Committee's recommendation elaborates that no person "should be permitted to practice in a forensic science discipline or testify as a forensic professional without certification." NAS Report at 7-18. "Certification requirements should include, at a minimum, written examinations, supervised practice, proficiency testing, continuing education, recertification procedures, adherence to a code of ethics, and effective disciplinary procedures." *Id.*

The "forensic science professionals" who performed much of the testing of the blood stain found in the victim's jean pocket lacked the qualifications the NAS Report requires. Because many of the analysts did not testify, the sentencing judge and jury were unaware that they lacked certifications and qualifications to perform the work that others relied on.

Lara Bahnweg, an FDLE analyst in the department of serology and DNA, performed serology testing which the State offered through the testimony of Robin

Ragsdale. Bahnweg testified in her deposition that she holds a Bachelor of Science in Biology. (Bahnweg Deposition p.3). She later received in-house DNA training when she was promoted within her department by FDLE. (Bahnweg Deposition p. 5). While Bahnweg claimed that she is qualified to perform DNA testing, she did not indicate that she had ever received any type of formal certification in DNA or blood analysis testing. In fact, because of her limited certifications, she was able only to perform a standard three-step phenolphthalein test for the presence of blood before passing the evidence off to another analyst for DNA testing. (Bahnweg Deposition p. 6).

Based solely upon this three step test for phenolphthalein, and an unsupported assumption that "that area would have come in contact with the skin or the underwear or anything like that, closest to the individual wearing it" (Bahnweg Deposition p. 18), Bahnweg testified that the blood stain had originated from the inside of Ms. Acosta's pocket.

Despite the fact that Bahnweg had no formal certification, nor was she actively pursuing certification through continuing education or proficiency testing at the time she performed her tests, her work was relied upon by Robin Ragsdale and offered by the State to establish aggravating factors. Relying on Bahnweg's reports, the State made specific reference during its closing arguments to the presence of blood on the jeans pocket in support of the theory that Mr. Tanzi

sexually assaulted the victim during a 1-1/2 hour period the State characterized as being "unaccounted for."

The practice of relying on unqualified forensic analysts was addressed and criticized by the Committee. The NAS Report establishes that there simply is no set of standards for quality assurance or for certifying practitioners in the various forensic disciplines. NAS Report at 7-1. The Report emphasizes that oversight for accreditation and certification must come from and independent source, outside the participating laboratory. *Id.* at 7-1, 7-2. Here, the unqualified, uncertified work performed by these FDLE employees on the DNA analysis reports allowed the jury to consider "scientific" evidence that was lacking any scientific foundation.

As the Committee noted, most forensic science disciplines are linked to the legal system and "have no significant uses beyond law enforcement." NAS Report at 1-14. Therefore, the Committee suggests that any study of forensic science "must include an assessment of the legal system. . . ." *Id.* As a system, forensic science "exhibits serious shortcomings in capacity and quality," and the courts rely on forensic evidence without fully "addressing the limitations of different forensic science disciplines." *Id.* Furthermore, the validity of the approach or the accuracy of conclusions in several forensic science disciplines has not been established. *Id.* at 1-14.

The use of questionable "scientific" evidence, coupled with the lack of standardized reporting and terminology in forensic disciplines, renders Mr. Tanzi's death sentence unreliable. Under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. *Furman v. Georgia*, 408 U.S. 238, 310 (1972)(per curiam). "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random handful" of individuals. *Id.* at 310 (Stewart, J., concurring). As the NAS report demonstrates, differences in terminology could mean the difference between life and death: two experts in the same field of forensic science may testify in two different cases and use different terminology to describe the same results so that one defendant is convicted or sentenced to death on the basis of that evidence and the other is not.

The imposition and carrying out of the death penalty in cases such as Mr. Tanzi's, which rely on untested and unreliable "scientific" evidence, also constitutes cruel and unusual punishment. When the myriad problems with so-called "scientific" evidence are considered together in analyzing its ability to deliver and/or produce a reliable result, the conclusion is inescapable: "it smacks of little more than a lottery system." *Furman*, 408 U.S. at 293 (Brennan, J., concurring) . The use of "scientific" evidence produced by methods of

questionable and untested underlying scientific principles cannot "assure consistency, fairness, and rationality" and it cannot "assure that sentences of death will not be 'wantonly' or 'freakishly' imposed." *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976).

Mr. Tanzi was prejudiced by the use of questionable "scientific" evidence which resulted from unreliable scientific practice. The scientific evidence presented to establish Mr. Tanzi's death sentence was tainted by the very concerns addressed by the National Academy of Scientists when exposing the unreliability of forensic science practices. As a result, Mr. Tanzi's death sentence is constitutionally infirm, and Mr. Tanzi is entitled to relief. The circuit court denied Mr. Tanzi's motion for leave to amend with this claim, and erred in denying relief.

B. Mr. Tanzi Was Deprived Of His Right To Confront Testimonial Evidence Used Against Him At His Capital Trial, In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. The Sixth Amendment right of an accused to confront witnesses against him is a fundamental right which has been made obligatory on the states by the due process clause of the Fourteenth Amendment. *Engle v. State*, 438 So. 2d 803, 814 (Fla. 1983); (citing *Pointer v. Texas*, 380 U.S. 400 (1965)). "The primary interest secured by, and the major reason underlying the

confrontation clause, is the right of cross-examination." *Id.* This right has been applied to the sentencing process in capital cases. *Specht v. Patterson*, 386 U.S. 605 (1967).

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Sixth Amendment guarantees a defendant's right to confront those "who 'bear testimony' " against him. 541 U.S. at 51. A witness's testimony against a defendant is [thus] inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Id.* at 54.

The Court outlined in *Crawford* that the nature of what constitutes 'testimonial statements' which are covered by the Confrontation Clause consists of:

> *ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52.

Recently, in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009); the Supreme Court extended this class of testimonial statements to scientific experts'

"certificates of analysis" which the Court considered "affidavits within [the] the core class of testimonial statements covered by [the] Confrontation Clause." *Id.* The Court further stated that "analysts were [also] not removed from coverage of Confrontation Clause on [the] theory that their testimony consisted of neutral scientific testing." *Id.* Based upon the understanding that such statements were created with the sole intention of establishing or proving some fact, the Court held that drug analysis certificates were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *Melendez-Diaz*, 129 S. Ct. at 2532; (citing *Davis v. Washington*, 547 U.S. 813, 830 (2006)) (emphasis deleted).

The Court determined that the analyst certificates functioned as "testimonial" statements and the analysts amounted to "witnesses" for purposes of the Sixth Amendment. *Melendez-Diaz*, 129 S. Ct. at 2532. Without some showing that the analysts were unavailable to testify at trial and that the defendant had a prior opportunity to cross-examine them, the Court held that the defendant was entitled to be confronted with the analysis at trial.[17]

[17] Melendez-Diaz was charged with distributing and trafficking in cocaine. At his trial the prosecution placed into evidence the bags seized from the defendant and another co-defendant along with three certificates of analysis showing the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags along with indicating the results of the examinations which had been performed to determine their consistency and the possible presence of narcotics. The defendant objected to the admission of the

At Mr. Tanzi's trial, the State relied upon DNA Analyst Ragsdale's testimony to establish that various samples of blood taken from the crime scene "matched" DNA samples taken from Mr. Tanzi. Ragsdale's testimony relied on notes and reports of other analysts who were not called to testify and were not subject to cross-examination. Ragsdale testified that samples had been "dried down" and a stain card created by Donna Isannidis. (R. 761-5). Ragsdale later testified to serology tests performed by Lara Bahnweg, which defense counsel noted "just for a point of clarification, [ ] was not done by her. It was done by a different analyst." (R. 770-7). Ragsdale was also permitted to testify regarding testing of duct tape that was performed by others.

Most significantly, Ragsdale was permitted to testify to Analyst Bahnweg's notes and statements regarding Bahnweg's opinion of the origin of the blood found in Ms. Acosta's pocket which the State argued was evidence of sexual assault:

> Q: Okay so is it accurate to say that by Ms. Bahnweg's opinion the bloodstain that was taken from the pocket of Ms. Acosta's jeans appeared to have soaked through from the outside of the jeans?
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certificates, arguing that the submission of the certificates into evidence, without requiring the analyst who actually performed the tests to testify in court, violated his right to confront and cross examine the witnesses against him. The Supreme Court found that introduction of such evidence did in fact violate the core principles of the Sixth Amendment's Confrontation Clause.

A: No. I believe from her notes and from looking at the stain, the blood appeared to have originated from inside the pocket.

Q: Well she wrote all stains appear to be coming from outside. Maybe I'm misunderstanding outside. I'm looking at, let's see, submission five, page two, about tow-thirds of the way down.

A: Under submission five she discussed the jeans. She has at the bottom of the page, note, stain C is on the inside surface of the pocket lining closest to the hip.

(R. 817-18).

On redirect examination, State introduced more of Bahnweg's hearsay statements through Ragsdale:

Q: Okay. And in this particular exhibit that pocket-did Ms. Bahnweg indicate that that came from the inside of the pocket or did that come from the outside of the pocket?

A: In her opinion by looking at the stain it appeared that the blood originated from the inside of the pocket next to the person's body, not from the inside of the pocket like if you had your hand in the pocket.

Q: It wasn't a soak through?

A: It didn't appear to be.

(R. 820-21).

Given that Ragsdale's testimony was instrumental in establishing aggravating factors justifying Mr. Tanzi's death sentence, it was critical that Mr. Tanzi be provided the opportunity to test the accuracy, methodology, and honesty of the analysts whose statements were presented to the jury. Donna Isannidis and Laura Bahnweg were responsible for creating, handling, and

preserving some of the samples of the blood stains used to perform the DNA analysis and examining evidence used against Mr. Tanzi. Their statements, made in anticipation of prosecution, were offered as evidence against Mr. Tanzi at his penalty phase, without the opportunity to cross examine the declarants. "Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross examination." *Melendez-Diaz*, 129 S. Ct. at 2537.

Statements, whether in the forms of reports, sworn affidavits, depositions, etc., which were made "under circumstances which would lead an objective witness [to] reasonably believe that the statement would be available for use at a later trial" have been long deemed 'testimonial' in nature. *Crawford*, at 541 U.S. at 52. Like the certificates of analysis addressed in *Melendez-Diaz*, the notes and reports testified to by Ragsdale at Mr. Tanzi's trial were created specifically for the purpose of establishing Mr. Tanzi's guilt and penalty at trial. As such, such statements should have been subject to the rigors of the Confrontation Clause of the Sixth Amendment at Mr. Tanzi's trial. "Forensic evidence is not uniquely immune from the risk of manipulation." *Melendez-Diaz*, 129 S. Ct. at 2536. Given that these particular statements were made by FDLE analysts working in conjunction with the State Attorney's Office, the incentive to falsify or favorably skew some of the findings is a credible concern. Statements based on forensic

evidence which is being offered to establish a defendant's guilt or penalty are precisely the kind of statements contemplated by the Sixth Amendment. The analysts' statements, whatever their form, which were testified to at Mr. Tanzi's penalty phase should have been subject to in court confrontation to evaluate their reliability and credibility. Allowing Ragsdale to testify to the statements and opinions of other analysts without Mr. Tanzi being afforded the opportunity to confront those witnesses violates the Sixth Amendment.

Furthermore, Mr. Tanzi's penalty counsel was ineffective for failing to object to this inadmissible hearsay testimony. *Strickland v. Washington*, 466 U.S. 668 (1984) . Mr. Tanzi was prejudiced as a result of counsel's failings. The State was allowed to present hearsay statements to establish the aggravating factor that the murder of Ms. Acosta was committed in the course of a sexual battery. This aggravating factor, which was specifically found and relied upon by the trial court when sentencing Mr. Tanzi to death. The finding of this aggravating factor resulted from counsel's failure to object to Ragsdale's inadmissible hearsay statement.

The lower court denied Mr. Tanzi's Motion for Leave to Amend with this claim because:

> The effects of *Melendez-Diaz v. Mass*, 129 S. Ct. 2527 (2009) is the extension of the Crawford Principle from police reports to notes of statements made by forensic examiners. The court finds that the *Melendez-Diaz* and *Crawford* cases do not apply retroactively, see *Whorton v. Booking* [*sic*], 549 US 406 (2007); *Chandler v. Crouhy* [*sic*], 916 So. 2d 728 (Fla.

> 2005). The recent opinion of the *Melendez-Diaz* case is not newly discovered evidence or a fundamental retroactive change in the law.

(PCR. 393). This was error.

In *Whorton v. Bockting*, 549 U.S. 406 (2007), the Supreme Court held that its ruling in *Crawford v. Washington*, on which *Melendez-Diaz* is based, was not retroactive "to cases already final on direct review." Id. at 409. The Supreme Court issued its opinion in *Crawford* in March, 2003. Mr. Tanzi's penalty phase was conducted in February, 2003, however, his sentence was not final on direct appeal until 2007. *Tanzi v. State*, 964 So. 2d 106 (Fla. 2007). Thus, because Mr. Tanzi's sentence was not final on direct review when the Supreme Court announced its decision in *Crawford*, and the Supreme Court's subsequent holding in *Melendez-Diaz* that *Crawford* does not apply retroactively cannot form the basis for denial of relief in Mr. Tanzi's case.

ARGUMENT V

THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. TANZI'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES IN VIOLATION OF FLA. R. CRIM. P. 3.852

Mr. Tanzi filed numerous supplemental public records demands pursuant to Fla. R. Crim. P. 3.852(g) and (i) from state agencies including Miami-Dade Police Department, Division of Elections, Florida Department of Law Enforcement,

Monroe County Sheriff's Office, Office of the Medical Examiner, Key West Police Department, and the Sixteenth Judicial Circuit State Attorney's Office. (Supp. PC-R. 42). Mr. Tanzi requested public records documenting internal affairs investigations, competency practice casework, and the personnel files.

The lower court denied Mr. Tanzi's demand for records regarding *Miranda* cards which the Monroe County Sheriff's Department utilized during the time period of Mr. Tanzi's arrest. The lower court's denial of sections demand was based upon a relevancy finding that none of the officers from the Monroe County Sheriff's Department actually any mirandized Mr. Tanzi. (Supp. PC-R. Vol VI 46-47). However, copies of the Miranda cards in use by the Monroe County Sheriff's Department at the time of Mr. Tanzi's arrest are relevant and reasonably calculated to lead to the discovery of admissible evidence since they were one of the investigating agencies initially involved in Mr. Tanzi's case and participated along with the Key West and Miami Dade police departments in interrogating him upon arrest.

The lower court also denied Mr. Tanzi's request for the personnel file of Monroe County Sheriff's Department officer James Norman. (Supp. PC-R. Vol. VI 50). Detective Norman's personnel files were necessary for a full investigation of Mr. Tanzi postconviction claims and are reasonably calculated to lead to the discovery of admissible evidence. Detective Norman was involved with Key West

Police Department and the City of Miami Police Department in the investigation of Mr. Tanzi's case. Detective Norman testified at Mr. Tanzi's trial. Any information in his personnel files demonstrating misconduct, veracity of incompetence would be relevant to Mr. Tanzi's case. Mr. Tanzi is entitled to information which would tend to show whether the integrity of the crime scene was appropriately protected.

In denying access to public records, the circuit court improperly considered the merits of any potential rule 3.851 claims. The merits of Mr. Tanzi's claims and whether he is entitled to an evidentiary hearing, are not germane to rule 3.852's requirements of diligence, specificity or relevance. Mr. Tanzi's entitlement to public records and his entitlement to an evidentiary hearing are two distinct inquiries — one governed by a standard set out in rule 3.852, the other governed by a standard set out in rule 3.851 — and the former must necessarily be decided before the latter. The clear meaning of Fla. R. Crim. P. 3.852 is that the relevancy requirement is met if Mr. Tanzi demonstrates that the records are relevant to the subject matter of a proceeding under rule 3.851. Rule 3.852 does not require Mr. Tanzi to prove the merits of his claim, or the entitlement to an evidentiary hearing, to demonstrate that he is entitled to public records disclosure. The issue of whether Mr. Tanzi is entitled to an evidentiary hearing cannot properly be addressed unless and until Mr. Tanzi has been afforded public records disclosure in order to investigate and fully develop his argument. Requiring Mr. Tanzi to prove

the merits of his claim in order to obtain the public records would completely obviate the purpose of Rule 3.852.

Collateral counsel met the requirements of Rule 3.852 to obtain additional public records. The records sought were relevant to Mr. Tanzi's postconviction claims. The circuit court abused its discretion in imposing additional requirements not specified by the Rule, and denying Mr. Tanzi's demands for additional public records. The denial of access to these public records was an abuse of discretion.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Tanzi respectfully urges this Court to reverse the lower court, grant a new trial and/or penalty phase proceeding, and grant such other relief as the Court deems just and proper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first-class postage prepaid to Scott A Browne, Assistant Attorney General, Concourse Center 4, Suite 200, 3507 East Frontage Road, Tampa, Florida 33607-7013, this 12th day of January, 2011.

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Assistant CCRC-South

CERTIFICATE OF FONT

I HEREBY CERTIFY that the foregoing Initial Brief has been reproduced in 14 Times New Roman type, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

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